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No. ~~1385~~

IN THE

Supreme Court of the United States

October Term 1970

In the Matter of: TMT TRAILER FERRY, INC., ET AL., THOMAS J. KIRKLAND, as Trustee for TMT TRAILER FERRY, INC., et al.,

Petitioner,

vs.

PROTECTIVE COMMITTEE FOR INDEPENDENT STOCKHOLDERS OF TMT TRAILER FERRY, INC.,

Respondent.

Petition for a Writ of Certiorari to The United States Court of Appeals for the Fifth Circuit

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APPENDIX

IRVING MARK WOLFF, P.A.
916 Biscayne Building
Miami, Florida 33130
Attorney for Petitioner.

MIAMI REVIEW — 371-4853 — 377-3721

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No. _____

IN THE

Supreme Court of the United States

October Term 1970

In the Matter of: TMT TRAILER FERRY, INC., ET AL., THOMAS J. KIRKLAND, as Trustee for TMT TRAILER FERRY, INC., et al.,

Petitioner,

vs.

PROTECTIVE COMMITTEE FOR INDEPENDENT STOCKHOLDERS OF TMT TRAILER FERRY, INC.,

Respondent.

Petition for a Writ of Certiorari to The United States Court of Appeals for the Fifth Circuit

APPENDIX

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

[TITLE OMITTED]

Filed November 10, 1969

PETITION BY PROTECTIVE COMMITTEE AND ITS COUNSEL FOR LEAVE TO APPEAL

Leave is sought to appeal under §250 of the Bankruptcy Act from two related orders (copies attached) of the District Court for the Southern District of Florida, both entered on October 9, 1969 in a Chapter X reorganization. This petition is filed on behalf both of a protective committee and attorneys for the committee as individuals.

1. Petitioners The Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc., are a committee authorized by the District Court in 1957 to represent stockholders in the reorganization proceedings.

2. Petitioners Irwin L. Langbein, Irma S. Mason and Malcolm S. Mason are of counsel to the Committee, but the present petition is also in their behalf as individual compensation claimants. Irwin L. Langbein is of the Florida and District of Columbia and New York bars, Irma S. Mason of the District of Columbia bar and Malcolm S. Mason of the New York bar. All are members of the bar of the Supreme Court and of this Court. Mr. Langbein is a member of the bar of the District Court, Mr. and Mrs. Mason's appearances there have been in association with Mr. Langbein.

3. The order as to which petitioning counsel seek leave to appeal awards them an interim fee of $10,000, plus $5,000 disbursements, for services totalling over 8,000 hours over a period of 11 years and out-of-pocket disbursements of over $22,000; and it imposes certain conditions. If leave to appeal is granted they propose to show that the compensation is inadequate and the conditions oppressive, beyond the proper scope of discretion.

4. Petitioning Committee seeks leave to appeal from the same order: (a) on the same grounds as its attorneys' complaint; and on the further grounds of (b) denial of protective order against attendance in Miami by the Committee (all three of whose members are resident in California or New York), and by its counsel (two out of three of whom reside in Washington, D. C.) for oral depositions sought to buttress trustee's counsel's objections to allowance of compensation to Committee counsel; (c) the portion of the same order denying instructions which would define the role of the Committee in future participation in the proceedings so as to protect it from continued harassment by the new trustee's counsel. Concurrently, the Committee is appealing by notice of appeal from the same order. On the latter two heads the petition is precautionary in case those portions of the order should be deemed not appealable as of right.

5. The other order herein involved, complained of by the petitioning Committee, awards interim compensation to a Special Master in the amount of $6,000 for 120 hours of work during three weeks of hearing, with jurisdiction reserved to tax the Committee as a party for that award and future awards and costs of the hearing.

The Proceedings: 1957 through '68

6. Proceedings for the reorganization of TMT Trailer Ferry, Inc. were initiated in June 1957. The Committee entered the case within a few weeks thereafter, the SEC a few months later, and both have participated ever since. Three reorganization plans were developed, confirmed and struck down, the third by the Supreme Court on certiorari at the instance of the Committee. The history of the proceeding to that point is summarized in Protective Committee v. Anderson, 390 US 414 (1968).

7. On remand to the District Court in mid-1968, the Committee faced renewed demanding and protracted proceedings. The Committee therefore moved for interim compensation for its counsel and that consideration of that motion be given priority next in order after hearing only of two desperately pressing necessities of the reorganization, a petition by the then trustee to purchase a new vessel, and the Committee's petition to remove the then trustee. The SEC supported the compensation application and the requested priority in view of the exceptional circumstances. As the District Court and this Court and the Supreme Court were earlier advised, in deference to the views of the SEC on compensation for committees and their counsel neither the Committee nor its counsel have solicited nor accepted expense or fee contribution from stockholders, and counsel have carried the financial burder of this case (which was over 11 years old at the time of their application and is now over 12 years old).

8. The District Court approved the priority, and early in September 1968, counsel filed in support of their applications, in detail comparable to earlier applications

by other fee claimants as ordered by that Court, a detailed statement of services rendered, showing time, subject matter and disbursements. (The then trustee, after extended evidentiary hearings in October 1968 on the Committee's petition to remove him, and extended briefing by counsel for the Committee and his own counsel on those hearings, has since resigned before the District Court ruled on removal, and a new trustee and new trustee's counsel have been appointed.)

9. Motions were filed by the then trustee and several creditors, to dismiss the interim compensation application and in objection, raising numerous issues of law including prematurity, non-compensability, conflict of interest, voluntary and duplicitous services.

10. An evidentiary hearing was held in December 1968 at which there was testimony and cross-examination on the compensation application. Voluminous records were proffered, additional witnesses (a bookkeeper present voluntarily and a former law partner present under subpoena) were available. Uncontradicted testimony, based on detailed records on hand in the courtroom, showed that counsel had devoted over 8,000 hours to the case up to the return of the case to the District Court on remand in mid-1968, and that more than two-thirds of this time was directly related to opposition to and appellate litigation against the three bad plans.

11. At the conclusion of the hearing on December 27, 1968, the District Court ruled that there were present such exceptional circumstances that an award of interim compensation was appropriate and would be made without further hearings. The Court allowed two weeks for recommendations as to the amount of such compensation.

12. Counsel had requested $100,000 interim fee allowance on account for services through remand of the plan vacated by Supreme Court to District Court, i.e., to June 30, 1968, and a little over $22,000 actual disbursements to August 31, 1968. The SEC recommended $60,000 on account of fees and $10,000 on account of disbursements. The trustee recommended that payment of the fee be at a rate not exceeding $5,000 per month.

January - October 1969

13. Thereafter, while the fee question was still pending, counsel for the Committee were required to participate in three weeks of hearings in the early spring of 1969 before a Special Master on the Shaffer-Spitzer claim and compromise, involving weeks of preparation including discovery in Washington, D.C. and New York City.

14. Suddenly, after the completion of those hearings, the fee award made in principle in December 1968 was suspended by an ex parte order of May 7, 1969 on the motion of the trustee's attorney. A few weeks later, under date of May 26, Committee counsel filed a renewal of their application, supplying record citations in rebuttal of trustee's counsel's allegations, and requesting prompt payment in view of the further time and money expended in the 9-10 months since the original application.

15. In another three weeks, under date of June 14, trustee's attorney filed a Reply elaborating a new series of wild charges asserted to bar any allowance for services prior to remand from Supreme Court. In addition he denied the compensability of services since remand (including the work already done on the trial of the Shaffer-Spit-

zer mortgage compromise, an issue mandated by the Supreme Court, for which no compensation application has yet been made) and warned that future participation for work on the Merrill-Stevens compromise, also mandated by the Supreme Court, would not be compensable.

16. Concurrently, trustee's counsel scheduled, cancelled, and rescheduled depositions in Miami of the Committee and its counsel, refusing alternative and less harassing means of getting at facts he said he wanted which had already been fully disclosed or proffered.

17. Petitioners refuted these new charges by memorandum and affidavit of July 9, 1969, and moved for protective order against oral depositions in Miami. They also moved on behalf of the Committee for instructions concerning the Committee's role representing stockholders and its future participation in the proceedings in view of trustee's attorney's persistent harassment, obstruction and denigration of Committee counsel. Action was again requested on the pending application for allowance, originally presented almost one year before.

18. The SEC, by memorandum of July 24, 1969, supported the Committee and its counsel, urging the injustice of deferring compensation to petitioners for their substantial past services "because of the diversionary procedures and contentions now proposed by counsel for the trustee".

19. On October 9, 1969, the Court entered the fee order complained of. Although no ruling was made on the charges made by trustee's attorney, the award implicitly rejects them since no award would have been appropriate had the Court deemed the charges true and legally relevant.

20. In this proceeding, interim allowances have been made to other attorneys for professional services at rates ranging from $25 to $50 per hour.

21. The fee awarded by the District Court of $10,000 on account of 8,000 hours of professional services amounts to $1.25 an hour. Alternatively if so modest a figure as $25 an hour is used, only 400 hours or 5% of the time is being compensated, although uncontradicted testimony showed that at least two-thirds of the time was directly related to defeat of plans, which is clearly compensable service under the statute.

22. Petitioning counsel assert and if leave is granted will show that the award is so manifestly inadequate as measured by the amount and quality and success of the services rendered and the ability of the estate to pay as to constitute an abuse of discretion; that in view of the services yet to be performed in this case and the conditions imposed on the award, the award constitutes an impairment of the ability of counsel to render adequate service to the class represented.

23. The fee request does not rest only on time devoted. Counsel have performed service in representing small scattered stockholders that is essential to the goals of Chapter X, they have performed these services loyally under trying conditions against strong opposition, and their success in the Supreme Court demonstrates the soundness of their legal positions. By defeat of the first plan alone they have demonstrably made possible approximately $1,000,000 of enrichment of the estate reflected in an increased participation of general creditors from 17½c on the dollar in Plan I to 37c on the dollar in Plan II.

24. This petition does not permit full evaluation of these questions. If leave is granted we shall support in detail the conclusion that the fee awarded is so grossly inadequate as to defeat basic purposes of the Bankruptcy Act and to be an abuse of discretion.

25. The conditions of the award are such as to further render it threatening to counsel particularly when viewed in the light a) of the fact that the conditions are different from the conditions imposed on other interim allowances by the same court and the same judge in the same case; and b) of the fact that the Court has declined to correct trustee's counsel's explicit assertions that Committee counsel will be entitled to no compensation for participation in the Shaffer-Spitzer and Merrill-Stevens proceedings although those proceedings were mandated by the Supreme Court and are essential to the formulation of any new plan.

26. The Committee seeks leave to appeal from the order of award and its conditions on the ground that the award is so inadequate and its conditions so oppressive that it becomes unfair and unreasonable to expect Committee and counsel to continue to devote the time effort and money required for adequate protection of the class they represent if this grossly inadequate award is permitted to stand uncorrected. The Committee will show, if leave is granted, that the award is not only inadequate in amount and unfair in its conditions, but it countenances and implements a course of action on the part of trustee's counsel calculated to undercut the ability of the Committee to participate herein.

27. In connection with the fee award, six months after the full evidentiary hearing, trustee's counsel sought to take depositions in Miami of all Committee counsel and all Committee members. These persons (other than one of Committee counsel resident in Florida, who offered to testify), reside in Washington, D.C., New York and California. The issues on which such depositions were ostensibly sought were matters already fully covered in the record on several occasions and irrelevant as a matter of law. Moreover, if trustee's counsel had in fact desired further information, there is no slightest showing that it was not readily available by means less gratuitously harassing. A detailed affidavit, covering all the matters on which trustee's counsel stated he wished to be informed, was furnished voluntarily. There is no showing and no allegation that the information already supplied was not truthful and complete, nor that further information, if desired, would not be obtained by interrogatories without chivvying Committee members who, without any significant personal stake, are serving on behalf of a class. If leave is granted it will be shown that there is no possible justification for the demanded depositions. They are part of trustee's counsel's attempt by harassment and intimidation, to drive the Committee out of the case as the insider creditors have long desired and trustee's counsel evidently now desires. The District Court's refusal to give any protective order under these circumstances is an abuse of discretion related to the other abuses of discretion complained of herein.

28. The Committee is concurrently appealing, but as matter of precaution since appeal may not be of right, the refusal of the District Court to grant instructions defining the role of the Committee. Trustee's counsel has refused to cooperate with the Committee, has repeatedly failed

notwithstanding constant reminder to serve copies of papers on Committee counsel resident in Washington, D.C. (although he has made service on Florida Committee counsel), has persistently undercut and denigrated the Committee, recklessly misrepresented facts about the Committee and misstated positions of the Committee, has scheduled unnecessary depositions, and by other actions harassed the Committee, and has publicly announced that the participation of the Committee and its counsel in major future proceedings will be noncompensable. We have asked the Court to put an end to such mistreatment by instructions. Its refusal to do so, we propose to show on appeal, is an abuse of discretion.

29. In seeking leave to appeal from the contemporary order awarding to the Special Master an interim fee of $6,000 for 120 hours of attendance at the Shaffer-Spitzer hearings, our criticism is twofold. We have no objection to the amount which we regard as high although not altogether unreasonable. We do complain of the improper proceduce and inadequate notice which led to it, and to the District Court's reservation of the authority to treat it not as an estate expense but as a court cost assessable against any party. In context, this is a threat that this and future like fees may ultimately be charged to the Committee. These proceedings were mandated by the Supreme Court. Our participation was required by the interests of the class we represent. The only party, other than the trustee and the Committee, in more than perfunctory participation in the hearings on the Shaffer-Spitzer claim, was Shaffer-Spitzer themselves. It is clearly not intended that such a charge be made to Shaffer-Spitzer, however, since trustee's counsel has proposed a settlement expressly waiving any such claim. The reserva-

tion of possible charge to the parties, we will show if leave is granted, is one more threat held over the head of the Committee calculated to prevent vigorous protection of the stockholder class.

30. Because the SEC, a government agency, is a party below, time to file the petition will not expire until December 8, 1969, under FRAP 4(a) and 6(a). In the interest of expedition it is nevertheless filed within the shorter time allowed under Rules 4(a) and 26(a) as if the SEC were not a party.

WHEREFORE petitioners pray for leave to appeal, under §250 of the Bankruptcy Act, from both orders entered October 9, 1969 of which copies are attached, and for such other and further relief as to the Court may seem just and proper in the premises.

IRMA S. MASON
4740 Connecticut Avenue,
N. W.
Washington, D. C.

IRWIN L. LANGBEIN
301 Citizens Building
West Palm Beach, Florida

Attorneys for The Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc. and also on behalf of themselves and Malcolm S. Mason individually.

By /s/ Irwin L. Langbein
Of Counsel

COPY HEREOF CERTIFIED served by mail this Saturday, November 8, 1969 to all addressees appearing on the list attached as part hereof.

/s/ Irwin L. Langbein
Attorney

[Mailing list omitted]

A. 13

IN THE UNITED STATES DISTRICT COURT IN AND FOR THE SOUTHERN DISTRICT OF FLORIDA MIAMI DIVISION

[TITLE OMITTED]

Filed October 9, 1969

RECEIVED OCT. 10, 1969

ORDER DENYING MOTION FOR PROTECTION AND ALLOWING PARTIAL INTERIM ALLOWANCE TO COUNSEL FOR PROTECTIVE COMMITTEE FOR INDEPENDENT STOCKHOLDERS AND PARTIAL REIMBURSEMENT OF EXPENSES

On December 27, 1968, after hearing, this Court reached a decision that the Protective Committee for independent Stockholders of TMT [hereinafter referred to as the "Committee"] with the assistance of their legal counsel had performed some services which were compensable within the purview of the provisions of the Bankruptch Act relating to Corporate Reorganization [11 U.S.C.A. §§ 501, et seq.].

However, the Court was unable to reach a determination as to the amount and value of said services, nor was the Court able to reach a determination as to what expenditures made by the Committee were proper costs for which it could allow reimbursement.

Subsequent to December 27, 1968 this Court appointed a successor Trustee and a new counsel for said Trustee. The successor Trustee through his counsel raised certain objections to the allowance of any remuneration or re-

imbursement for costs to the legal counsel for the Committee. To buttress this position, said counsel for the Trustee noticed the taking of the depositions of the individual members of the Committee and legal counsel for the Committee, which counsel sought to participate in any allowances made by this Court and in any reimbursement for costs allowed by this Court. The counsel for the Committee filed a motion for a protective order, seeking to prevent the holding of the depositions and the taking of testimony.

These proceedings have been immensely complicated and protracted. There has been much appellate litigation, and counsel for the Committee seeks remuneration upon the total rendition of all the services involved. In purview of the applicable statutes [11 U.S.C.A. §§ 642, 643] it is apparent that this Court must make a determination to ascertain what portion of the services rendered are in fact chargeable to the estate, and which of said services are to be borne by the materially and adversely affected group of stockholders. All of the services rendered by the counsel for the Committee are not chargeable to this estate. A careful reading of the foregoing statutory provisions establishes specific limitations for the allowance of remuneration and reimbursement of court costs to stockholders committees and their counsel. Stockholders committees and their counsel are entitled to compensation and reimbursement within the limited confines of Section 242 of the Bankruptcy Act [11 U.S.C.A. § 642]; while stockholders and their attorneys are entitled to remuneration and reimbursement for costs expended in accordance with the provisions of Section 243 [11 U.S.C.A. § 643]. Therefore, the Court must factually determine which of the services rendered by counsel for the Committee are

entitled to be recognized as services entitled to remuneration under Section 242 of the Bankruptcy Act [11 U.S.C.A. § 642], and inasmuch as no application has been made under Section 243 of the Bankruptcy Act [11 U.S.C.A. § 643], the Court will not concern itself with considering any awards under this particular section. However, the Court is required to separate and distinguish between the services involved so that it may allow only proper remuneration and reimbursement in accordance with the applicable provisions of the Bankruptcy Act.

The awarding of all fees in reorganization proceedings is a pure administrative court function, and the Court's continuing jurisdiction over the subject matter and the parties allows it where justice and equity are best served to amend, modify, alter or strike any orders previously entered, in discharge of administrative judicial function. The Bankruptcy Act recognizes this continuing jurisdiction [Section 57k of the Bankruptcy Act (11 U.S.C.A. § 93k)].

The Court further finds that the provisions of the Bankruptcy Act pertaining to Corporate Reorganization [11 U.S.C.A. § 501, et seq.; General Orders of Bankruptcy promulgated by the Supreme Court of the United States, and the Local Bankruptcy Rules of the United States District Court for the Southern District of Florida (Rule 10)], do not provide for the interim allowance of fees or recoveries of expenditures for parties other than a receiver, a trustee, or their attorneys, or a court appointed accountant. However, the Court feels in its discretion that the allowance of a partial interim fee to counsel for the Committee would not be an abuse of discretion, in that

the Court does recognize that said counsel has performed some service beneficial to the administration of the instant estate.

The Court being fully advised in the premises, it is therefore,

ORDERED that the motion for protection and instructions filed by the Committee be and the same is hereby denied.

It is further ORDERED that the said Trustee, THOMAS J. KIRKLAND, shall, if he deems fit, reschedule the taking of the depositions of the following parties, upon reasonable notice as provided for in the Rules of Civil Procedure: Irma S. Mason, Malcolm S. Mason, Nathan D. Lobell, Irwin S. Mason, Irwin L. Langbein and Raymond M. Bukaty. That said witnesses are parties to these proceedings and therefore their attendance will be required without all or any of them being tendered attendance fees, witness fees or travel expenses. However, leave is reserved to any and all of the said parties to apply to this Court, subsequent to the taking of their respective depositions, to make application for reimbursement of their travel and other expenses, if any there be.

It is further ORDERED that counsel for the Committee shall be awarded a partial interim allowance and reimbursement for costs expended at this time. However, nothing herein contained shall be deemed to establish the law of the case, or to be res judicata as to the matters herein in this specific matter presented, or binding upon this Court to require a further and additional award or

reimbursement of costs. This Court does specifically reserve jurisdiction over the parties and the subject matter to enter such other and further orders which it deems necessary and proper in the premises considered, should the said parties to whom said awards and reimbursement are made fail to discharge their burden of proof as to the instant allowance and all future allowances.

Therefore, in accordance with the conditions herein set forth, the Court awards to counsel for the Committee a partial interim allowance of Ten Thousand Dollars ($10,000.00) and a partial reimbursement for costs expended in the amount of Five Thousand Dollars ($5,000.00); and the Trustee is directed to make the foregoing disbursements, the same being classified as costs of administration of this instant estate.

DONE AND ORDERED at Miami, Florida, this 8th day of October, 1969.

s/ W. O. MEHRTENS
United States District Judge

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[TITLE OMITTED]

Filed November 15, 1969

ANSWER TO PETITION BY PROTECTIVE COMMITTEE AND ITS COUNSEL FOR LEAVE TO APPEAL

COMES NOW, THOMAS J. KIRKLAND, Trustee of TMT Trailer Ferry, Inc., et al., Debtors, by and through his undersigned counsel, Irving M. Wolff, and files this his Answer to the Petition heretofore filed by the Protective Committee and its Counsel seeking leave to appeal from those certain Orders entered by the Honorable William O. Mehrtens, United States District Judge, United States District Court in and for the Southern District of Florida, Miami, Division, both dated October 9, 1969, and attached to the said petition.

This Answer will direct itself to the legal principles in support of the Trustee's position to dismiss the said hereinabove entitled petition. The Answer will not attempt to make a direct response to the unfounded aspersions, innuendoes, unwarranted conclusions, misrepresentations of the status of the record, and the allusions to extraneous and irrelevant matters attributed to a portion of the record.

Therefore, the petition when analyzed seeks permission for leave to appeal two orders, to review rulings involving the following: (a) an award of interim fees which the petitioners deem insufficient; (b) a denial of the entry of a protection order sought by the petitioners; (c) the

trial court's refusal to enter an order bestowing a quasi attorney for the trustee status upon the counsel for the Protective Committee; and (d) the reservation of jurisdiction by the Reorganization Court to assess costs for proceedings conducted and held before the Special Master.

In addition to a direct response to the contents of the petition, the Trustee's counsel will raise additional grounds in support of the argument to withhold consent for the prosecution of the appeal. These additional grounds are (a) jurisdiction, and (b) waiver.

ARGUMENT

I. No jurisdiction—untimely filing.

The petition was not received by the Clerk of this Court until November 11, 1969 [Exhibit A attached hereto and made a part hereof]. In accordance with Rule 6(a), Federal Rules of Appellate Procedure [hereinafter referred to as F.R.A.P.], the petition was not timely filed, and therefore this Court is not vested with jurisdiction to entertain the same.

The Federal Rules of Appellate Procedure where they are in conflict with the procedural requirements of the Bankruptcy Act in relation to the taking of appeals, supersede the bankruptcy procedural requirements. [9 Moore's Federal Practice, p. 1208.]

Therefore, the provisions of Rule 4(a) F.R.A.P. concerning the filing of a notice of appeal govern the filing of the instant petition, and therefore the petition should have been filed within thirty (30) days from the date of

the orders involved in this appellate litigation. Inasmuch as both orders were dated October 9, 1969, and the thirtieth day subsequent thereto was a Saturday, the petitioners under Rule 26(a), F.R.A.P., would have been allowed to and including November 10, 1969 within which to file the said petition. However, it is clear that the Clerk of this Court did not receive the said petition until November 11, 1969.

Mailing is never substituted for filing. This Court has ruled that if a notice of appeal [in this instance a petition for leave to appeal] is mailed to the Clerk, it is not deemed filed with the said Clerk until it is in the Clerk's control and custody, not necessarily stamped as received, but subject to the Clerk's control. If such a notice, as the instant petition, is received after the expiration of time fixed for the filing, the filing is untimely and the Court is divested of its appellate jurisdiction. [LeJeune v. Midwestern Insurance Company, 197 F.2d 149 (5th Cir. 1952).]

This Court, though vested with jurisdiction to enlarge certain time prescriptions by the appellate rules, is not vested with jurisdiction to enlarge the time for filing a petition for permission to appeal. [Rule 26(b) F.R.A.P.]

The allegations contained in paragraph 30 of the petition deal with an ill-conceived assumption on the part of the pleader. The Securities and Exchange Commission of the United States of America is a party to these proceedings in a limited fashion. It is precluded from prosecuting appeals in Chapter X reorganization proceedings. [Section 208 of the Bankruptcy Act (11 U.S.C.A. § 608).] Thus, the provisions of Rule 4(a) F.R.A.P., which extend the filing of a notice of appeal (or a petition for permission

to appeal) by any party to sixty (60) days if an agency of the United States is a party, is not applicable. The sixty-day interval for the filing of an appeal is for the benefit of the agency of the United States, and if such agency is precluded from exercising an appellate right, other parties cannot benefit from an extension primarily granted to a passive litigant. Hence the thirty-day limitation provided for by the rules governs, and if the petitioners failed to comply with said time limitation, this Honorable Court is divested of its appellate jurisdiction and cannot retain the matter, and is required to dismiss the same.

II. Waiver.

During the pendency of an appeal before a Circuit Court of Appeals a case becomes moot, i.e., there is no longer any case or controversy before the court, the appellate tribunal loses its jurisdiction. [Cover v. Schwartz, 133 F.2d 541 (2d Cir. 1943), cert. denied 319 U.S. 748, 63 S.Ct. 1158, 87 L.Ed. 1703, rehearing denied 319 U.S. 787, 63 S.Ct. 1325, 87 L.Ed. 1728; Article III, § 2, United States Constitution.]

When a party accepts the benefits of and complies with the order subject to the appellate proceedings, such a party in effect extinguishes the controversy, and by his own action renders the appeal moot. [Kaiser v. Standard Oil Co., 89 F.2d 58 at 59 (5th Cir. 1937); applied as a general theory of law in Grathwohl as Secretary-Treasurer v. United States, 401 F.2d 166 (5th Cir. 1968).]

Has the conduct of the petitioners subsequent to the entry of the order sought to be reviewed activated these general principles so as to estop their right to appeal this

portion of the order? On October 16, 1969 counsel for the Committee advised the undersigned counsel for the Trustee that he was in receipt of the interim allowance ($10,000.00) and partial reimbursement of costs and expenses ($5,000.00), that he was segregating the proceeds of the checks after clearance, and that by this procedure he was not acquiescing in the order of October 9, 1969 [presumably the order awarding the interim allowance]. Attached hereto as Exhibit B is a copy of the said correspondence. The checks were in fact deposited to the law office account of Irwin L. Langbein on or about October 13, 1969. Attached hereto as Exhibits C-1 and C-2 are TMT Trailer Ferry, Inc. checks executed by the Trustee, Nos. 11736 and 11737.

It is suggested that this action on the part of counsel for the Committee is so inconsistent with the petition to appeal that it in fact must be deemed a waiver of the right to petition for leave to appeal as to this portion of the October 9, 1969 order.

III. Awards of interim fees to parties other than the Trustee and his attorney in reorganization are not subject to review.

An allowance of an interim fee to parties other than a reorganization trustee and his attorney are interlocutory. Such an order does not have a definite operative finality and therefore is not in itself reviewable. [Georgia Jewelers, Inc. v. Bulova Watch Co., 320 F.2d 362 (5th Cir. 1962).]

The allowance of an interim fee in reorganization proceedings is a pure administrative function of the Reorganization Court and such allowance will not be dis-

turbed unless the record reflects an abuse of discretion, or an error of law, or a complete disregard of what has been referred to as "a legal standard". [Massachusetts Mutual Life Insurance Co. v. Brock, 405 F.2d 429 (5th Cir. 1969).]

There can be no showing of error in the application of any of the foregoing requirements. It is apparent that a party seeking compensation and allowance in a Chapter X proceeding is burdened to demonstrate that his claim is within the purview of the statute, and that such party is entitled to an allowance within the provisions of the specific sections of the Act; specifically, that a proper party is making application in accordance with allowances provided for commensurate with specific services as set out in the applicable provisions. [Woods v. City National Bank and Trust Company of Chicago, 312 U.S. 262, 61 S.Ct. 493, 85 L.Ed. 820 (1941); 50 Yale L.J. 1942.]

The fact that no objections are made to claims seeking compensation does not relieve judge of the responsibility of carefully examining such claims, and constitutes no test to the value or compensability of said requests. [Matter of Detroit International Bridge Co., 111 F.2d 235 (6th Cir. 1940); In re Kentucky Electric Power Corp., 11 F.Supp. 528 (W.D.Ky. 1935).]

A claim for compensation or reimbursement must stand or fall on its worth and not upon the lack of opposition of others. The particular facts available or presented, combined with the broad discretion of the Reorganization Judge, are the basic combinations for the allowance of an award and the amount thereof. [Chicago & West Towns Railway v. Freedman, 230 F.2d 364 (7th Cir. 1956); Creditors Committee of Fox Markets, Inc. v. Ely, 337 F.2d 461 (9th Cir. 1964).]

The Acts of Congress relating to reorganization allow compensation for the performance of definite and specific services to specific parties classified in accordance with the requirements of the applicable provisions. A party seeking compensation is burdened to prove not only his claim for compensation as to amount, but that the compensation sought is a proper allowance within the specific classifications provided for in the Act. Failing in this, the allowance must be denied. [Cooke v. Bowerstock, 122 F.2d 977 (8th Cir. 1941); Sections 242 and 243 of the Bankruptcy Act (11 U.S.C.A. §§ 642 and 643).]

Duplicitous activity, activity which produced no benefit to the estate, and unnecessary activity do not constitute the basis of a proper claim for compensation. Mere participation in the proceedings does not create an absolute right for compensation or reimbursement. The Bankruptcy Act requires economics of administration and forbids duplication of compensation for the same services rendered by different parties, or for the rendering of voluntary service, or for such service that creates empty burdensome procedures. [Matter of Porto Rican American Tobacco Co., 117 F.2d 599 (2nd Cir. 1941); In re Food Town, Inc., 208 F.Supp. 139 (D.C.Md. 1962); In re Townsend Growth Fund, 245 F.Supp. 484 (D.C.N.Y. 1965).]

The petitioners feel that because a hearing was held, which they term evidentiary, the Reorganization Court is precluded from any further examination of the matter. They further contend that since they proferred testimony, with no takers, the successor Trustee and his attorney are barred from investigating, and lastly they maintain that

since the Securities and Exchange Commission made its recommendation as to interim fees, the Reorganization Court is precluded.

The argument is inconsistent. The application was for interim fees. This term by itself connotates that final fees will be sought, and therefore the application for interim fees admits a continuing jurisdiction in the matter. Since the burden upon the petitioners was not discharged, the court magnanimously allowed some interim fees and reimbursement for costs.

We call the Court's attention to a decision which sharply criticizes recommendations of the Securities and Exchange Commission and succinctly sets forth the agency's advisory capacity only. [In re Yuba Consolidated Industries, 260 F.Supp. 930 (N.D.Cal. 1966); In re Coast Investors, Inc., 388 F.2d 622 (9th Cir. 1968).]

IV. The denial of the protection order.

In accordance with General Order 37 [General Orders Promulgated by the Supreme Court of the United States in Bankruptcy], the rules of civil procedure are applicable in bankruptcy proceedings where the same are not in conflict.

Under Section 21b of the Bankruptcy Act [11 U.S.C.A. § 44b] there is specific provision for the right to take depositions in proceedings under the Bankruptcy Act, in accordance with the laws of the United States which are now in force, or as may hereafter be enacted, in relation to the taking of depositions.

As has been heretofore pointed out, interlocutory orders in bankruptcy which do not resolve a question conclusively and finally are not appealable. [Georgia Jewelers, Inc. v. Bulova Watch Co., supra.]

An order requiring or denying discovery proceedings or refusing to enter a protective order in discovery proceedings is not a final disposition of any independent offshoot of the litigation, and therefore are not generally appealable. [Cogen v. United States, 278 U.S. 221, 49 S.Ct. 118, 73 L.Ed. 275 (1929); see also 4 Moore's Federal Practice, pp. 1712-1715; see also as to application of said principle in bankruptcy matters — Farrar, The Appealability of the Right of Interlocutory Discovery Matters in Bankruptcy, 23 U. Miami L.Rev. 366 (1969).]

We have already seen that one who seeks compensation must discharge the statutory burdens commensurate therewith. It is also a basic premise that petitions for fees in bankruptcy and reorganization matters should contain detailed and enumerated intemizations of the services performed and the time expended. The petition should reveal the beneficial results obtained through each specific endeavor. Where a petition fails to meet such a standard it may be disregarded and stricken, or the applicant may be burdened with discharging the required proof.

Attached hereto and made a part hereof as Exhibits D-1 and D-2 are sample pages of the enumerations upon which the petition for fees and reimbursement was sought by counsel for the Committee. It is noted that said enumerations leave much to be desired, and a proffer of evidence to supplement the same is insufficient. The burden being placed upon the applicant for the compensation, it

cannot be discharged by innuendo. [In re Nazareth Fair Grounds & Farmers Market, 374 F.2d 595 (2d Cir. 1967); Hudson & Manhattan Railroad Company, 339 F.2d 114 (2d Cir. 1964).]

Thus, what better example of sound judicial discretion can be present when the trial court in recognizing the applicant's shortcomings awards an interim allowance for such services as are obviously beneficial to the estate, and affords the trustee the opportunity to discover for evidentiary purposes facts which would aid and assist the court in ultimately disposing of the matter so as not to do violence to its discretion.

We have enumerated elsewhere some of the governing limitations which affect the awarding of fees in reorganization matters. The court is required to make an investigation for its own satisfaction that it is not awarding compensation for services which are voluntary, duplicitous, frivolous or rendered on behalf of a specific group, which group is specifically required to bear its expenses and fees. The mere fact that the Stockholders Committee in soliciting authorizations represented to stockholders that they would not be subjected to expenditures of costs and attorneys fees does not ipso facto require a Reorganization Court to compensate and reimburse said Committee for every moment which its counsel expended in these proceedings. For the Court's enlightenment we attach hereto and make a part hereof as Exhibit E the authorization circulated by the Committee.

In passing, this Honorable Court is reminded that one litigant may not select for his opposite number a discovery procedure, whether it be for convenience or

otherwise. It is elementary that self-serving affidavits do not replace effective cross-examination and direct confrontation, especially where much evidentiary material has not been discovered and made available to the court.

V. The refusal of the Reorganization Court to bestow upon counsel for the Protective Committee a quasi attorney for the Trustee status.

At this late date in the proceedings it appears that counsel for the Stockholders Committee is at a loss as to what its status is. This status is clearly set forth in its authorization [Exhibit E, supra]. It appears that the opinion of the Supreme Court of the United States [Protective Committee v. Anderson, 390 U.S. 414 (1968)] created in the atmosphere surrounding counsel for the Stockholders Committee ozone so thin that their perspective was shattered.

It appears now that the petitioners confuse their respective status with that of the Trustee and his attorney [paragraph 28 of the Petition]. The contents of this particular paragraph are not only scurrilous, they are not in effect supported by the record, in that they are replete with unfounded conclusions ascertained through crystal ball gazing, seeking to create an impression that counsel for the Stockholders Committee is clothed with special status requiring the Trustee and his counsel to await the beck and call of the Committee. It is admitted that services of the Committee's counsel were refused where said services would have been duplicitous, confusing and of little value. It is also admitted that the Trustee in the administration of the estate was required to economically control legal

services rendered so that there would be no duplicity of compensation, especially if ineptness were to be the basis of such reward.

In view of the attitude of counsel for the Committee, it appears that they are not interested in an honest and fair administration of the estate, but rather a participation in prolonged hearings to increase expenses for their own benefit, sanctified by an order of court to be entered prior to the rendition of services. The orders sought would in effect subjugate the Trustee to a status of partisanship and would vitiate the impartial and objective vision of a trustee as required by the Bankruptcy Act.

There is no requirement in law for such an order and the refusal to enter the same is not appealable. It has no finality and it is purely administrative and discretionary. In view of the foregoing, the court did not abuse its discretion in refusing the entry of the same.

VI. The reservation of jurisdiction to assess costs—proceeding before the Special Master.

As has been pointed out previously, under General Order 37, supra, the applicable provisions of the Rules of Civil Procedure, where they do not conflict with the Bankruptcy Act, are applicable.

There is nothing inconsistent with the appointment of a special master in a reorganization proceeding [Section 117 of the Bankruptcy Act (11 U.S.C.A. § 517)]. The petitioners admit that they do not challenge the interim award made to the Special Master. They candidly acknowledge that the Reorganization Court did not abuse its

discretion in fixing said amount [paragraph 29 of the petition]. However, they insert into the petition a speculative apprehension based upon erroneous conclusions, with references to matters which were not before the court at the time of the entry of the order for which permission is sought to appeal.

Thus we must strike from the petition all references and allegations concerning the Shaffer-Spitzer settlement, since the same were not a portion of the record on October 9, 1969, and in bankruptcy matters the scope of review by a court of appeals is limited to that portion of the record which was presented to the court below at the time the order was entered from which the review is sought. [Fortner and Perrin, Inc. v. Smith, 327 F.2d 801 (9th Cir. 1964); Dubnoff v. Goldstein, 385 F.2d 717 (2d 1967); O'Dell v. United States, 326 F.2d 451 (10th Cir. 1964).]

It appears that the petitioners are possessed with a pang of conscience, for they seek to be cleansed of all wrongdoing which resulted in excessively burdensome litigation brought about by themselves. In their quest for special status, i.e., they can do no wrong, they would desire that the Reorganization Court be limited in the application of all jurisdictional authority concerning the assessment of costs and expenses where the same were recklessly created. The petitioners feel that the Debtor estate is taxable with all costs and expenses of all proceedings and undertakings, whether justifiable or otherwise. The law provides to the contrary. Where a litigant or its counsel has caused excessively burdensome proceedings to have been held where they were not needed, or where attorneys multiplied proceedings in any case so as to increase costs unreasonably and vexatiously, they may be

required by the court to personally satisfy such excess costs. [28 U.S.C.A. §§ 1912 and 1917.] By recklessly alleging harassment, the petitioners seek to be absolved of any exposure under the foregoing statutes that they may have.

The reservation of jurisdiction by the Reorganization Court is not only proper, but is required. The action is not final, it is not conclusive, and in fact is purely interlocutory. What has been said elsewhere as to finality of orders in bankruptcy and in other proceedings is applicable here. At such time as there is an assessment and a taxing of costs, then and only then will appeal lie from such order. What petitioners seek to do here is to short circuit the Reorganization Court's jurisdiction and determine the outcome of an appeal by this Court prior to the trial court entering its ruling. This procedure is unknown in the judiciary system of the United States of America.

It is therefore apparent in view of the foregoing that the petition should be denied.

Dated at Miami, Florida this 14th day of November, 1969.

Respectfully submitted,

/s/ Irving M. Wolff

IRVING M. WOLFF
Attorney for Trustee
916 Biscayne Building
Miami, Florida 33130

A. 33

United States Court of Appeals
FIFTH CIRCUIT

EDWARD W. WADSWORTH
Clerk

OFFICE OF THE CLERK

ROOM 400-600 ROYAL ST.
NEW ORLEANS, LA. 70130

November 11, 1969

Mr. Irwin L. Langbein
Attorney at Law
301 Citizens Building
West Palm Beach, Florida

Ms. Irma S. Mason
Attorney at Law
4740 Connecticut Avenue, N.W.
Washington, D. C.

In The Matter Of: TMT Trailer Ferry, Inc., et al

(1) Petition by protective committee and its counsel for leave to appeal

(2) * November 21, 1969

Dear Sir:

I am authorized by this Court to advise that the above (1) has been received and filed, and under the rules and practice of this Court will be presented for ruling without oral argument on the date* shown in column (2) above, together with any response or opposition that may be filed by opposing counsel by that date.

Very truly yours,

EDWARD W. WADSWORTH, Clerk

By R. E. Windhorst, Jr.
Deputy Clerk

/eav

cc: See Attached List:

* This is only the date on which it is now expected that the matter will be forwarded for ruling and does not mean that this office will be able to advise counsel of the Court's action by then. Counsel should allow at least ten days' time thereafter for advice as to the Court's ruling before making inquiry.

FPI 67—5/68 60-100-5437

WESTERN UNION Telegram

OPA012 1 0344A EST NOV 13 69 AE028 NS5071
NS LLD022 TY COLLECT 2 EXTRA NEW ORLEANS LA 13 911A CST
IRVIN/ M WOLFF
916 BISCAYNE BLDG MIAMI FLO
AS REQUESTED THIS IS TO ADVISE THAT THE PETITION BY PROTECTIVE COMMITTEE AND IT'S COUNSEL IN THE MATTER OF TMT TRAILER FERRY INCORPORATED ET AL WAS RECEIVED AND FILED IN THIS OFFICE ON NOVEMBER 11, 1969
RICHARD E WINDHORST JR DEPUTY CLERK US COURT OF APPEALS
(922).

EXHIBIT A

IRWIN L. LANGBEIN
ATTORNEY AT LAW
301 CITIZENS BUILDING
WEST PALM BEACH, FLORIDA

TELEPHONE 833-6053

October 16, 1969

Irving M. Wolff, Esq.
916 Biscayne Building
Miami, Florida

Dear Mr. Wolff: TMT - 3659-M-Bi

I have deposited the trustee's $5,000 and $10,000 checks which came in over the weekend, but this is not to be taken as an acquiescence in the order entered October 9. I am segregating the proceeds of the checks after clearance, subject to appeal from that order, which we propose to take.

Mrs. Mason reports that she has not received service copy of that order, nor of the like dated order on the special master's fee. This is at least the third time that papers out of your office got to me but not to her, and I have complained to you about it before.

Sincerely yours,

IRWIN L. LANGBEIN

ILL:h

cc: Mrs. Mason
Hon. William O. Mehrtens

EXHIBIT B

Partial interim reimbursement for costs expended per Court order dated October 8, 1969

No. 11736

63-512
631

MIAMI, FLORIDA October 9, 1969

Pay to the order of Irwin L. Langbein, Counsel for Protective Committee of T.M.T. Stockholders $ 5,000.00

Five Thousand and 00/100 DOLLARS

T. M. T. TRAILER FERRY, INC.
AUTHORIZED SIGNATURE

FLORIDA NATIONAL BANK
AND TRUST COMPANY
AT MIAMI
MIAMI, FLORIDA

⑆063105120⑆ 2 14 810 7 "0000500000"

MEMBER OF FLORIDA NATIONAL GROUP OF BANKS

FOR DEPOSIT ONLY
IRWIN L. LANGBEIN
LAW OFFICE ACCT.

EXHIBIT C-1

Partial allowance of interim fees per court order 1/28

No. 11737

MIAMI, FLORIDA October 9, 1969

Pay to the order of Irwin L. Langbein - Counsel for Protective Committee for Independent Stockholders $ 10,000.00

T.M.T. TEN THOUSAND AND NO/100 DOLLARS

T. M. T. TRAILER FERRY, INC.

FLORIDA NATIONAL BANK AND TRUST COMPANY AT MIAMI
MIAMI, FLORIDA

⑆063100512⑆ 2⑈14⑈810⑈2⑈ ⑈0001000000⑈

MEMBER OF FLORIDA NATIONAL GROUP OF BANKS

OCT

IRWIN L. LANGBEIN
LAW OFFICES

OCT

EXHIBIT C-2

1967

Major litigation activities of 1967: certiorari proceedings in the Supreme Court — petition (34 pages) and reply brief; brief on the merits (72 pages) and reply brief, and oral argument at Washington. Briefs of trustee, S-S and SEC ran 34 - 72 pages each.

Committee pleadings		Documents by other parties requiring extended consideration	
1/9	Petition for writ of certiorari	1/26	Trustee brief in opposition
2/8	Reply brief	3/25	SEC memorandum in support of certiorari
		5/16	Trustee reply to SEC memo
6/6	Motion dispense with printing record		
8/21	Application for extension time to file brief		
9/8	Brief	9/	SEC brief
		10/19	Trustee's brief
		10/20	S-S brief
11/6	Reply brief	11/	SEC reply brief
11/7, 8	Oral argument		

DISBURSEMENTS: total not less than $3,270.00

Mason:	
long distance phone tolls and wires	$ 107.03
travel (W.P.B. to Wash.)	84.42
printing, mimeo and bulk postage	903.07
miscellaneous	128.30
	1,222.82
Langbein:	
long distance phone tolls and wires	321.82
travel	1,021.89
printing, mimeo and bulk postage	563.71
miscellaneous	139.76
	$2,047.18

TIME: total not less than hrs. 1,226-½

Mason, M: not less than 268 hours on 86 days

Mason, I.: not less than 418-½ hours on 120 days

Langbein: not less than 540 hours on 124 days

EXHIBIT D-1

1968

Major litigation activities of 1968 to date through June 30, 1968: proceedings in Court of Appeals on remand, seeking removal of trustee and judge and detailed instructions on mandate.

Committee pleadings	Documents by other parties requiring extended consideration
5/ Application to Court of Appeals (telegram) for extension time to June 4 to answer trustee	5/14 SEC suggestions to Court of Appeals
	5/17 Trustee response
	5/23 Trustee notice of hearing on June 7
	5/28 Trustee reply to committee wire
	5/28 SEC reply to trustee
Motion postpone hearing	5/29 SEC motion to postpone hearing
6/3 Petition for guidance mandate	6/4 Trustee objections to delay
	6/4 District Court order postponing hearing on mandate
6/6 Telegram protesting fees	6/25 Order of Circuit Court of Appeals

DISBURSEMENTS:	total not less than	$1,289.23
	adjustments	1,051.90*
		$2,341.13

Mason:	
long distance phone tolls and wires	$ 63.97
printing, mimeo and bulk postage	11.53
miscellaneous	183.66
	259.16

Langbein:	
long distance phone tolls and wires	368.10
printing, mimeo and bulk postage	49.13
travel	384.89
miscellaneous	227.95
	$1,030.07

TIME: total not less than hrs. 364-¾

Mason, M.: not less than 84 hours on 31 days

Mason, I.: not less than 173 hours on 53 days

Langbein: not less than 107-¾ hours on 44 days

EXHIBIT D-2

*Principally consisting of unentered 1965 mimeographing of appeal record of Plan III ($602.00) and 33 unentered trips West Palm Beach to Miami by personally owned auto ($539.55).

Total disbursements 1957 to Aug. 30, 1968 (does not include $500 appeal cost bonds outstanding, believed recoverable on demand) not less than $18,496.44

Total time 1957 to June 30, 1968 not less than hrs. 8,133-3/4

IRMA S. MASON
1001 Connecticut Avenue, W. N.
Washington, D. C. 00036

IRWIN L. LANGBEIN
301 Citizens Building
West Palm Beach, Florida 33401

Attorneys for Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc.

By s/Irwin L. Langbein
Of Counsel

STATE OF FLORIDA)
COUNTY OF PALM BEACH)

IRMA S. MASON, MALCOLM S. MASON, and IRWIN L. LANGBEIN, being duly sworn by the undersigned officer, on their oaths say:

We have jointly prepared the above Statement of Time and Disbursements. With respect to recitals of individual activities of each of us the person whose activities are recited says it is true; and with respect to the activities of other persons each of us is informed and believes it to be true.

s/Irma S. Mason
IRMA S. MASON

s/Malcolm S. Mason
MALCOLM S. MASON

s/Irwin L. Langbein
IRWIN L. LANGBEIN

Sworn to and subscribed before me this September 2, 1968

s/M. Daphene Hatcher (N. P.)
Notary Public, State of Florida

My Commission expires: 12/13/68

PROTECTIVE COMMITTEE FOR INDEPENDENT STOCKHOLDERS OF TMT TRAILER FERRY, INC.

AUTHORIZATION

The undersigned holder of the shares listed below of TMT Trailer Ferry, Inc., hereinafter called the Corporation, hereby authorizes Raymond M. Bukaty, Nathan D. Lobell and Irwin S. Mason as a Protective Committee for holders of common stock of the Corporation (and such committee as from time to time constituted), hereinafter called the Committee, to represent the undersigned as such holder subject to the conditions hereinafter set forth, in connection with all proceedings in the United States District Court for the Southern District of Florida, for the reorganization of the Corporation and before any other courts, commissions and administrative bodies in connection with such reorganization, and the negotiation, formulation or development of any plan of reorganization.

This authorization is unconditionally revocable at the will of and without expense to the undersigned at any time, by written notice from the undersigned to the Secretary of the Committee.

The Committee, its Secretary and its Counsel shall be entitled to no fees or reimbursement of expenses pursuant to this authorization, except such as may be allowed and paid out of the estate of the Corporation by and under order of the United States District Court for the Southern District of Florida, or other court having jurisdiction, subject to such approval by any commission or other independent person as may be required.

The Committee shall submit such reports and statements of account to the undersigned as the Committee may deem necessary for the adequate information of the undersigned, or as shall be directed by any proper court, commission or administrative body in connection with such reorganization.

The authorization shall not constitute a consent to or dissent from any plan of reorganization and does not authorize the Committee or any person to give such a consent or dissent.

WITNESS my hand and seal this ____ day of _____ 1957.

_____ L.S.
(signature)

In the presence of

_____

Print your name & address here _____

_____

How many shares of TMT do you hold? _____

Since what date have you held these shares? _____

Are they registered in your own name? _____ If not, in whose?_____

Business name, address and phone _____

_____

Broker's firm name & address _____

_____

Broker's registered representative's name _____

_____

Return to Malcolm S. Mason, Secretary
Room 1807, 55 Liberty Street,
N. Y. 5, N. Y.

EXHIBIT E

IN THE UNITED STATES DISTRICT COURT IN AND FOR THE SOUTHERN DISTRICT OF FLORIDA MIAMI DIVISION

[TITLE OMITTED]

Filed November 13, 1969

NOTICE OF APPEAL

Notice is hereby given that The Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc., a party to the proceeding, hereby appeals to the United States Court of Appeals for the Fifth Circuit from the order of this Court entered October 9, 1969 entitled "Order Denying Motion for Protection and Allowing Partial Interim Allowance to Counsel for Protective Committee for Independent Stockholders and Partial Reimbursement of Expenses".

IRMA S. MASON
4740 Connecticut Avenue, N.W.,
Washington, D.C.

IRWIN L. LANGBEIN
301 Citizens Building
West Palm Beach, Florida

Attorneys for Protective Committee
for Independent Stockholders of
TMT Trailer Ferry, Inc.

By /s/ Irwin L. Langbein
Of Counsel

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Misc. No. 1546

Filed December 12, 1969
In the Matter of:

TMT TRAILER FERRY, INC., ET AL,
Debtors

On Petition for Leave to Appeal

Before THORNBERRY, COLEMAN and AINSWORTH, Circuit Judges.

BY THE COURT:

It appearing that the petition by the Protective Committee and its counsel for leave to appeal under Section 250 of the Bankruptcy Act from the orders of the District Court entered on October 9, 1969, was received by the Clerk of this Court on November 10, 1969, though not actually filed until November 11, 1969, the filing of such petition must be considered as timely under Rule 26(a), F.R.A.P. Accordingly, the motion for correction of the docket entry of date of receipt from November 11, 1969, until November 10, 1969, the date it was actually received and within the custody and control of the Clerk, is hereby GRANTED, and the records of the Clerk are hereby corrected nunc pro tunc accordingly.

The petition by the Protective Committee and its counsel for leave to appeal from the district court's order fixing compensation for the attorneys is GRANTED.

The petition by the Protective Committee and its counsel for leave to appeal from the district court's refusal to grant instructions defining the role of the Committee and from the order awarding an interim fee to the Special Master is DENIED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Misc. No. 1546

Filed January 15, 1970

In the Matter of:

TMT TRAILER FERRY, INC., ET AL,

Debtors.

On Petition for Leave to Appeal

Before THORNBERRY, COLEMAN and AINSWORTH, Circuit Judges.

BY THE COURT:

The order of this Court entered on December 12, 1969 on the petition of the Protective Committee and its counsel for leave to appeal from certain orders of the District Court in this cause is amended so as to further provide as follows:

The petition by the Protective Committee and its counsel for leave to appeal from that portion of the District Court's order denying the motion for protection and instructions filed by the Committee is DENIED.

IN THE UNITED STATES DISTRICT COURT IN AND FOR THE SOUTHERN DISTRICT OF FLORIDA MIAMI DIVISION

[TITLE OMITTED]

The following Certificate was filed in the United States Court of Appeals for the Fifth Circuit on February 8, 1970, as a portion of the Appellee's Response to Appellant's Opposition to Motion to Dismiss

CERTIFICATE OF CLERK OF UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF FLORIDA

COMES NOW, the undersigned Deputy Clerk for and on behalf of Joseph I. Bogart, Clerk of the United States District Court in and for the Southern District of Florida and does certify that I have made an examination of the docket and the other records kept by the Clerk's Office of the said Court in the matter of TMT Trailer Ferry, Inc., et al, Debtor in Reorganization, Case No. 3659-Bk-M-WM; and that subsequent to December 12, 1969, I find no Cost Bond on appeal filed by the Protective Committee for Independent Stockholders for TMT Trailer Ferry, Inc.

CERTIFIED at Miami, Florida this 5th day of February, 1970.

JOSEPH I. BOGART, Clerk

By /s/ S. Rodriguez
Deputy Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[TITLE OMITTED]

No. 29089
Filed February 19, 1970

Appeal from the United States District Court for the Southern District of Florida

---

Before THORNBERRY, COLEMAN and AINSWORTH, Circuit Judges.

BY THE COURT:

IT IS ORDERED that appellee's motion to dismiss the appeal, filed in the above styled and numbered cause, is hereby DENIED.

It is further ORDERED that the appellant herein file a cost bond in accordance with Rule 7 of the Federal Rules of Appellate Procedure. If appellant does not precisely comply with the spirit and letter of the Rules of Appellate Procedure in the continued prosecution of this appeal, the appeal will be dismissed.

Appellee must file his brief within forty days from the date of this Order.

DATED THIS 19th DAY OF FEBRUARY, 1970.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[TITLE OMITTED]

No. 29089*

Filed March 30, 1970

*Improper designation, should have been No. 29560. (our correction)

Appeal from the United States District Court for the Southern District of Florida

---

Before THORNBERRY, COLEMAN and AINSWORTH, Circuit Judges.

BY THE COURT:

The Court having considered appellee's motion to dismiss the appeal filed on November 13, 1969 from the portion of the district court's order denying the motion for protection and the appellants' motion for an extension of time for filing and docketing this appeal, it is ORDERED that appellants file and docket the appeal within fifteen days after the date of this order or the appeal will be dismissed according to Rule 9(b) of the Local Rules of this Court.

DATED this 30th day of March, 1970.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[TITLE OMITTED]

No. 29089

Filed April 9, 1970

Appeal from the United States District Court for the Southern District of Florida

---

Before THORNBERRY, COLEMAN and AINSWORTH, Circuit Judges.

BY THE COURT:

IT IS ORDERED that ruling on appellants' motion to dispense with appendices is deferred pending the filing of all briefs for the parties.

IT IS FURTHER ORDERED that appellants' request for an extension of time to transmit the record is granted and the time is extended to April 15, 1970.

A. 58

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[TITLE OMITTED]

No. 29089
Filed April * 1970

*unreadable date.

Appeal from the United States District Court for the Southern District of Florida

---

Before THORNBERRY, COLEMAN and AINSWORTH, Circuit Judges.

BY THE COURT:—

IT IS ORDERED that appellee's motion to dismiss the appeal, filed in the above styled and numbered cause, for failure of appellants to comply with the order of this court of February 19, 1970, is hereby DENIED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[TITLE OMITTED]

Nos. 29089 & 29560
Filed May 8, 1970

Appeals from the United States District Court for the Southern District of Florida

---

ORDER:

IT IS ORDERED that the motion of appellee for consolidation of the above entitled and numbered causes is hereby DENIED.

It is further ordered that the motion of appellee for permission to file a brief in excess of 70 pages, but not to exceed 100 pages is hereby DENIED.

It is furthered ordered that the motion of appellee for oral argument of these causes is hereby HELD IN ABEYANCE.

/s/ Homer Thornberry
UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[TITLE OMITTED]

No. 29089
Filed May 14, 1970

Appeal from the United States District Court for the Southern District of Florida

---

ORDER:

IT IS ORDERED that the motion of appellee for reconsideration of the denial of leave to file a brief in excess of 70 pages is GRANTED, but the brief of appellee must be limited to 91 pages by offset reproduction.

/s/ Homer Thornberry
UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[TITLE OMITTED]

No. 29089
Filed July 10, 1970

Appeal from the United States District Court for the Southern District of Florida

---

ORDER:

IT IS ORDERED that the motion filed by the Securities and Exchange Commission for leave to file reply brief in the above styled and numbered cause, is hereby GRANTED.

/s/ Homer Thornberry
UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[TITLE OMITTED]

No. 29560
Filed September 22, 1970

Appeal from the United States District Court for the Southern District of Florida

---

Before THORNBERRY, COLEMAN and AINSWORTH, Circuit Judges.

BY THE COURT

IT IS ORDERED that the motion of the Securities and Exchange Commission for leave to file reply memorandum in the above cause is hereby GRANTED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[TITLE OMITTED]

No. 29089
No. 29560

Appeals from the United States District Court for the Southern District of Florida

---

(October 27, 1970)

(Opinion Oct. 27, 1970, 5 Cir., 1970, 434 F.2d 804).

Before THORNBERRY, COLEMAN and AINSWORTH, Circuit Judges.

PER CURIAM: Our orders of December 12, 1969 and January 15, 1970 in Misc. No. 1546, now Docket No. 29089, granted the petition of the Protective Committee and its counsel, appellants, for leave to appeal under Section 250 of the Bankruptcy Act from the District Court's order entered October 9, 1969, insofar as it related to the fixing of compensation for the attorneys. However, the Protective Committee's petition was denied insofar as it pertained to the District Court's refusal to grant a protective order against the taking of depositions by the Trustee of the three members of the Protective Committee

and its three attorneys, and to the denial of the Committee's motion to grant instructions defining the role of the Committee.

The Protective Committee on November 13, 1969 filed its notice of appeal from the District Court's order dated October 9, 1969 entitled "Order Denying Motion for Protection and Allowing Partial Interim Allowance to Counsel for Protective Committee for Independent Stockholders and Partial Reimbursement of Expenses." On March 2, 1970, the Trustee filed his motion to dismiss the appeal under Rule 9(b) of the local Rules of this Court in which he recited the details of our orders of December 12, 1969 and January 15, 1970, and further averred that the Protective Committee and its counsel had undertaken no further action whatsoever in connection with the notice of appeal filed on November 13, 1969. Accordingly, the Trustee requested that upon the expiration of fifteen days and after due notice, the appeal initiated by the Protective Committee's notice of appeal dated November 13, 1969 be dismissed for want of prosecution.

A response was filed by appellant Protective Committee which stated in part: "Two appeals from that order [i.e., the order of October 9, 1969] were initiated. Appeal One: A petition to this Court sought review under §250 of the Bankruptcy Act, of so much of the order as dealt with compensation and reimbursement. Because the depositions were sought as part of a series of objections by appellee to the application for counsel's compensation and reimbursements, and out of an abundance of caution, the committee also sought leave to appeal from the denial of the motion for instructions and protective order. Appeal Two: At the same time, an appeal as of right by the com-

mittee was noticed from that part of the order which denied the motion for instructions and protection." The Protective Committee urged denial of appellee's motion to dismiss the appeal and moved the Court for time within twenty days to perfect the record of a second appeal.

On March 30, 1970, we ordered that appellants file and docket the second appeal within fifteen days thereafter, which was done, and Docket No. 29560 was assigned to it.

Thereafter, by our order dated May 8, 1970, we denied the motion of appellee Trustee for consolidation of the two appeals.

Oral argument on these two appeals and on numerous pending motions has been heard and we make the following disposition thereof:

1. Our denial of the motion to consolidate these two appeals and the motion to consolidate is reconsidered and is now granted.

2. That portion of our orders of December 12, 1969 and January 15, 1970 wherein we denied the petition of the Protective Committee and its counsel for leave to appeal from the District Court's refusal to grant instructions defining the role of the Committee and from the denial of the motion for protection against the taking of the depositions of the three members of the Committee and its three counsel, is also reconsidered. In our view appellants were entitled of right to appeal this portion of the District Court's order without permission of the Court under Section 250 of the Bankruptcy Act. We do not agree

that the filing of the petition for permission and subsequent denial thereof estopped appellants from pursuing their appeal as of right from that portion of the District Court's order. See Section 24a of the Bankruptcy Act, 11 U.S.C. §47a; 2 Collier on Bankruptcy 734 (14th ed. 1969 rev.); Freeman v. Seligson, D. C. Cir., 1968, 405 F.2d 1326, 1332; In re Commonwealth Financial Corporation, 3 Cir., 1969, 408 F.2d 640, certiorari denied sub nom. Thal v. Commonwealth Financial Corp., 395 U.S. 961 (1969); Henry Ansbacher and Co. v. Klebanow, 2 Cir., 1966, 362 F.2d 569.

3. The District Court was in error and much too low in its award of an interim fee to counsel for the stockholders' Protective Committee of $10,000 and expenses of $5,000, and the interim award is grossly inadequate. Section 242, Chapter X of the Bankruptcy Act, 11 U.S.C. §642. Though the District Court has a broad discretion in the award of fees, the appellate court is likewise an expert on the reasonableness of fees, and may exercise an independent judgment with reference thereto. Mass. Mutual Life Ins. Co. v. J. H. Brock, 5 Cir., 1968, 405 F.2d 429, 432, 435. We conclude that the circumstances here warrant the use of our own independent judgment in this free controversy. The Securities and Exchange Commission having participated fully in these proceedings (now in their thirteenth year), from the very beginning of the filing of the Chapter X reorganization, is intimately familiar with the services rendered by the Committee's counsel over a long period of years, and strongly recommends approval of an interim amount of $60,000 counsel fees and $10,000 reimbursement of expenses as partial allowances for services and expenses, and further recommends that the interim award shall not be subject to va-

cation, setting aside, reduction or modification except upon proof of legal disqualification. Counsel for the Committee seek an interim award of $100,000 fees and $20,000 reimbursement of expenses. At oral argument, SEC counsel (who has represented the Commission throughout this bankruptcy) stated unequivocally that this Court could safely accept the Commission's recommendation as to an interim award, which amount the Protective Committee's counsel had as a minimum, earned to date.

A contradictory hearing was held in the District Court on the question of the interim award for fees and expenses and testimony of two of the three Committee lawyers as to the services rendered was received. The third attorney was present in the courtroom and tendered for cross-examination which was declined. Counsel testified that they had expended in excess of 8,000 hours of time in services for the Committee which they detailed for the Court. Committee counsel produced a detailed statement of services and expenses. They brought their books and records of time and disbursements to the hearing and testified to the accuracy of their statement. SEC counsel, the then Trustee's counsel, and attorneys for creditors cross-examined the Committee counsel. These services were, of course, highlighted by the effective presentation in the Supreme Court of the United States which resulted in rejection of a plan of reorganization which had been approved by the District Court and this Court. See Protective Committee v. Anderson, 390 U.S. 414, 88 S.Ct. 1157 (1968). Accordingly, in order to do substantial justice and to prevent undue hardship, we believe we should follow the SEC recommendation both as to amount and as to not being subject to vacation, etc., which we consider fair and reasonable, and it is so ordered.

4. The taking of depositions by the Trustee through its counsel of the three members of the Committee and its course, highlighted by the effective presentation in the three counsel is unnecessary especially in view of the award we have made herewith. A protective order should have been issued by the District Judge to prevent undue harassment. A full hearing had already been held on the issue of an interim award. The depositions would substantially duplicate what had already transpired in the contradictory proceeding before the District Judge himself. In the future the District Court should, in the firmest and most emphatic manner possible, state to the Trustee and its counsel the absolute need of cooperation and harmony with the Protective Committee and its counsel to insure a proper determination and final wind-up of this reorganization.

The District Court was in error in denying the Committee's motion for instructions defining the role of the Committee. The Trustee through its counsel has taken the position throughout this appeal that the Committee and its counsel are entitled to no compensation for their services. That services have been rendered in connection with opposition to a proposal or plan, however, is not grounds for denying compensation. 6A Collier on Bankruptcy § 13.06, at 954. Neither is it proper to deny compensation for opposition to a proposal or plan on grounds that the Committee's position duplicates the position of the Trustee's or some other party's. 6A Collier on Bankruptcy § 13.10, at 968. The Committee is entitled to participate fully in these proceedings, and if its services result in a some benefit to the estate, compensation for those services is authorized. 6A Collier on Bankruptcy § 13.06, at 954.

The several contentions and motions of the parties have been duly considered. They are disposed of either directly or by implication by what we have decided here.

Costs of this appeal shall be borne by the bankrupt estate.

The judgment of the District Court is accordingly reversed and the case remanded for further proceedings in accordance with this order.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[TITLE OMITTED]

Nos. 29089 & 29560
Filed November 30, 1970

Appeal from the United States District Court for the Southern District of Florida

---

Before THORNBERRY, COLEMAN and AINSWORTH, Circuit Judges.

BY THE COURT:

IT IS ORDERED that appellee's motion for leave to file petition for rehearing en banc out of time in the above style and numbered causes is hereby GRANTED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[TITLE OMITTED]

No. 29089
No. 29560

Appeal from the United States District Court for the Southern District of Florida

---

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion Oct. 27, 1970, 5 Cir., 1970, 434 F.2d 808).

(December 21, 1970)

Before THORNBERRY, COLEMAN and AINSWORTH, Circuit Judges.

PER CURIAM: The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[TITLE OMITTED]

October Term, 1969

No. 29089
29560

D. C. Docket No. Bk 3659-M

Appeals from the United States District Court for the Southern District of Florida

---

Before THORNBERRY, COLEMAN and AINSWORTH, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and the same is hereby remanded to the said District Court for further proceedings in accordance with the opinion of this Court;

It is further ordered that appellee pay to appellants, the costs on appeal to be taxed by the Clerk of this Court.

October 27, 1970

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[TITLE OMITTED]

NO. 29089 & 29560
Filed January 25, 1971

Appeal from the United States District Court for the Southern District of Florida

---

Before THORNBERRY, COLEMAN and AINSWORTH, Circuit Judges.

ON CONSIDERATION OF THE MOTION of appellee for recall and stay of judgment issued as mandate in the above numbered and entitled cause, pending an application for a writ of certiorari to the Supreme Court of the United States,

IT IS ORDERED that the judgment issued as mandate, be recalled and stayed to and including February 24, 1971, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within said period there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that certiorari petition and record have been filed.

IT IS FURTHER ORDERED that the Clerk shall issue the judgment as mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of the above period unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

Hereafter appears portions of the record available to the Reorganization Judge [trial court — United States District Court for the Southern District of Florida], which lead to the entry of the October 9, 1969 Order, which was made the subject of both appellate proceedings in the United States Court of Appeals for the Fifth Circuit.

A. 75

IN THE UNITED STATES DISTRICT COURT IN AND FOR THE SOUTHERN DISTRICT OF FLORIDA MIAMI DIVISION

STATEMENT OF COMMITTEE UNDER SECTION 211

Filed August 5, 1957

[TITLE OMITTED]

The Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc., consisting of Raymond M. Bukaty, Nathan D. Lobell and Irwin S. Mason, makes the following statement under oath for filing by it with this Court pursuant to the requirements of Section 211 of the Bankruptcy Act.

1. Attached hereto marked Exhibit A and made a part hereof, is a copy, omitting signatures and dates, of the instruments, some of which are dated, signed by the stockholders, enumerated in the list marked Exhibit B and made a part hereof whereby the said Committee is empowered to act in behalf of stockholders.

2. The pertinent facts and circumstances in connection with the organization and employment of such Committee by the stockholders are as follows: The stockholders of the debtor are widely scattered. The Committee is informed and believes that there are over 8,000 stockholders of the debtor, many of whom hold blocks of 1000 shares or less. This Committee was organized, formed and agreed to act pursuant to informal discussion among the

members thereof. Of the Committee members, two, Raymond M. Bukaty and Irwin S. Mason, are the beneficial owners of stock of the debtor. They are also members of an investment club holding stock of the debtor. The third member, Nathan D. Lobell, was invited to join the Committee because of his experience and training in investment matters. He holds no stock of the debtor. These discussions were held at the initiative of the members of the Committee, and there participated in some of them, in addition to members of the Committee, Malcolm S. Mason, who is also a member of the investment club referred to. Informal discussions indicated that the formation of a committee for group action in protection of the interests of stockholders was desirable and the members believed that a substantial number of holders of small blocks of stock would welcome such representation. The Committee was thereupon formed and notified a small number of stockholders of its formation by letter, inviting stockholders' authorizations.

3. The members of the Committee hold the following shares: Raymond M. Bukaty, 500 shares beneficially owned, held street name (broker, Shearson Hammill & Co.) and acquired in September 1956 at a cost of $2,000. Mr. Bukaty also holds a 12/228 interest in Vemby Investment Club which acquired 6000 shares on September 6, 1956 at a cost of $22,500 and sold 100 shares on September 13, 1956 for a price of $398.95.

Irwin S. Mason owns 400 shares acquired in September 1956 at a cost of $1500. He also holds a 6/228 interest in Vemby Investment Club whose holdings are described above.

Nathan D. Lobell holds no shares.

The Committee has requested Malcolm S. Mason to act as Secretary and as Counsel, and Potter, Langbein & Burdick to act as Counsel. Malcomb S. Mason is also a member of the investment club referred to above. Together with his wife, he holds 300 shares acquired in September 1956 at a cost of $1125 and also a 30/228 interest in Vemby Investment Club whose holdings are described above. No member of the firm of Potter, Langbein & Burdick holds any shares.

4. A showing of the stock represented by this Committee and the respective amounts thereof, and the time of acquisition thereof, is as stated in the list annexed hereto, marked Exhibit B and made a part hereof. The Committee has reason to believe that additional authorizations will be received by it shortly.

The Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc., consisting of Raymond M. Bukaty, Nathan D. Lobell, Irwin S. Mason.

By /s/ Raymond M. Bukaty
a Member

/s/ Malcolm S. Mason
Malcom S. Mason
55 Liberty Street
New York, New York

Potter, Langbein & Burdick
205 Datura Street
West Palm Beach, Florida

By /s/ Irwin L. Langbein
Attorneys for the Committee

State of New York)
County of New York) ss.

/s/ Raymond M. Bukaty, being duly sworn, says: I am a member of the Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc. and am duly authorized to make this affidavit in its behalf. The said statement is true according to the best of my knowledge, information and belief.

/s/ Raymond M. Bukaty

Subscribed and sworn to before me
this 26 day of July, 1957.

/s/ Henry J. Kamena
Notary Public, State of New York
My Commission Expires: March 30, 1959

PROTECTIVE COMMITTEE FOR INDEPENDENT STOCKHOLDERS OF TMT TRAILER FERRY, INC.

AUTHORIZATION

The undersigned holder of the shares listed below of TMT Trailer Ferry, Inc., hereinafter called the Corporation, hereby authorizes Raymond M. Bukaty, Nathan D. Lobell and Irwin S. Mason as a Protective Committee for holders of common stock of the Corporation (and such committee as from time to time constituted), hereinafter called the Committee, to represent the undersigned as such holder subject to the conditions hereinafter set forth, in connection with all proceedings in the United States District Court for the Southern District of Florida, for the reorganization of the Corporation and before any other courts, commissions and administrative bodies in connection with such reorganization, and the negotiation, formulation or development of any plan of reorganization.

This authorization is unconditionally revocable at the will of and without expense to the undersigned at any time, by written notice from the undersigned to the Secretary of the Committee.

The Committee, its Secretary and its Counsel shall be entitled to no fees or reimbursement of expenses pursuant to this authorization, except such as may be allowed and paid out of the estate of the Corporation by and under order of the United States District Court for the Southern District of Florida, or other court having jurisdiction, subject to such approval by any commission or other independent person as may be required.

The Committee shall submit such reports and statements of account to the undersigned as the Committee may deem necessary for the adequate information of the undersigned, or as shall be directed by any proper court, commission or administrative body in connection with such reorganization.

The authorization shall not constitute a consent to or dissent from any plan of reorganization and does not authorize the Committee or any person to give such a consent or dissent.

WITNESS my hand and seal this ____ day of _____ 1957.

_____ L.S.
(signature)

In the presence of

_____

Print your name & address here _____

_____

How many shares of TMT do you hold? _____

Since what date have you held these shares? _____

Are they registered in your own name? _____ If not, in whose? _____

Business name, address and phone _____

Broker's firm name & address _____

Broker's registered representative's name _____

Return to Malcolm S. Mason, Secretary
Room 1807, 55 Liberty Street, N.Y. 5, N.Y.

EXHIBIT B

NAME	NUMBER OF SHARES	DATE OF ACQUISITION
Busby, Elsbeth	400	9/20/56
Gemlich, Edward	400	4/3/56
Smeds, Carl	200	3/18/57
Buschman, Ernst & Helene	100	9/14/56
Schwarz, Henry & Erika	500	4/4/56
Weiss, Perry B.	2000	September 1956
Kurash, Annette	1800	September 1956
Noles, Omar J.	4000	11/26/56
Robinson, Devereux	1000	May 1957
Perna, Mr. & Mrs. John	600	November 13, 1956
Model, Roland & Stone	1600	10/56 to 6/57
Kafrissen, Ancel	800	9/14/56 and 9/26/56
Mason, George Z.	300	September 1956
Barreca, Peter	1300	November 1, 1956
Sayegh, George	400	3/12/57
Zaloom, George M.	400	3/20/57
Musarra, Gerald	700	6/20/57
Shashaty, William	1400	May 24, 1957
O'Connor, Thomas	200	September 19, 1956
Smidesang, Magnhild	500	9/26/56
Sepe, Joseph	400	Sept. 1956 & June 57
Bukaty, Raymond M.	500	September 1956
Schaffer, David	600	3/20/56
Schaffer, David, Fred & Louis	400	4/12/56
Schaffer, Louis	200	8/27/56

EXHIBIT B (cont.)

NAME	NUMBER OF SHARES	DATE OF ACQUISITION
Mason, David B.	200	9/15/56
Eldot, Leon Davis	1000	
Mason, Irwin S.	400	September 1956
Mason, Irma S.	300	September 1956
Schatzberg, Max	150	
Villers, R.	750	September 1956
Schecter, Samuel	100	
Vemby Investment Club	5900	September 1956
Tracey, Augustine	100	10/9/56
Tracey, Marilyn	200	3/21/57
Dilts, Helen M.	50	4/12/56
Rothweiler, Charles F.	500	1/24/57
Allen, George & James	480	
Swartz, Abraham & Estelle	200	4/4/56 to 6/11/57 3/20/57
Kuich, John	500	10/6/56
Harvey, Arthur J.	500	4/3/56
Schwartz, Arnold	400	1955, 1956, 1957
Bunkoff, Edward	200	3/20/57
Willink, Arthur	300	4/9/56 & 4/18/57
Willink, Ruth	100	4/30/57
Ferber, Haskel	300	4/5/56 & 7/25/56
Lapin, Elsie	200	4/17/56 & 11/19/56
Mastellone, George	600	May 1957
Caruso, Victor	1300	April 1957
Jones, J. C.	1500	1/8/57 & 3/20/57
Beck, Carl & Marie	400	4/11/56 & 3/20/57

IN THE UNITED STATES DISTRICT COURT IN AND FOR THE SOUTHERN DISTRICT OF FLORIDA MIAMI DIVISION

STATEMENT OF ATTORNEYS UNDER SECTION 210

Filed August 5, 1957

[TITLE OMITTED]

Malcolm S. Mason and Potter, Langbein & Burdick, attorneys for Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc., make the following statement pursuant to Section 210 of the Bankruptcy Act. We are attorneys at law, and we are asking as such herein for Raymond M. Bukaty, Nathan D. Lobell and Irwin S. Mason, collectively known as Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc., and who have filed a statement under oath as such committee under Section 211 of the Bankruptcy Act. The address of the Committee is: Room 1807, 55 Liberty Street, New York, 5 New York. The following is quoted from the sworn statement filed herein by that committee:

"The members of the Committee hold the following shares: Raymond M. Bukaty, 500 shares beneficially owned, held in street name (broker, Shearson Hammill & Co.) and acquired in September 1956 at a cost of $2,000. Mr. Bukaty also holds a 12/228 interest in Vemby Investment Club which acquired 6,000 shares on September 6, 1956, at a cost of $22,500, and sold 100 shares on September 13, 1956 for a price of $398.95.

"Irwin S. Mason owns 400 shares acquired in September 1956 at a cost of $1,500. He also holds a 6/228 interest in Vemby Investment Club whose holdings are described above.

"Nathan D. Lobell holds no shares."

Malcolm S. Mason
55 Liberty Street
New York, New York
and

Potter, Langbein & Burdick
205 Datura Street
West Palm Beach, Florida

By /s/ Irwin L. Langbein
Of Counsel

IN THE UNITED STATES DISTRICT COURT IN AND FOR THE SOUTHERN DISTRICT OF FLORIDA MIAMI DIVISION

PETITION FOR DESIGNATION TO RECEIVE NOTICES, AND FOR PERMISSION TO BE HEARD

Filed August 30, 1957

[TITLE OMITTED]

Petitioners Raymond M. Bukaty, Nathan D. Lobell and Irwin S. Mason represent:

1. An involuntary petition for the reorganization of TMT TRAILER FERRY, INC. alleged debtor, under Chapter X of the Bankruptcy Act is now before the Court.

2. Petitioners, as and constituting PROTECTIVE COMMITTEE FOR INDEPENDENT STOCKHOLDERS OF TMT TRAILER FERRY, INC., have filed in this proceeding a statement under § 211 of the Bankruptcy Act, setting forth documents of authority from various stockholder of the alleged debtor corporation.

3. Petitioners are not aware of the formation of any other committee for the holders of stock of the alleged debtor corporation.

4. Petitioners are independent of the management of the alleged debtor corporation.

5. Petitioners are not able to determine, without participation in the proceeding in such fashion, as to permit independent assessment of the facts as they develop, whether the interests of non-management stockholders are adequately represented by the present management of the alleged debtor corporation.

6. Petitioners have complied with all applicable laws regulating the activities and personnel of their committee.

7. As more appears from the petitioners' statement filed under § 211, petitioners have engaged Malcolm S. Mason of the New York bar, and Potter, Langbein & Burdick of the Florida bar, to represent them as counsel in this proceeding, and counsel have filed statement under § 210 of the Bankruptcy Act.

WHEREFORE, petitioners pray that this Court designate them, collectively, as a person to receive notice of all matters arising in this proceeding; that the Court direct that such notice be by service upon Potter, Langbein & Burdick, 205 Datura Street, West Palm Beach, Florida and upon Malcolm S. Mason, 55 Liberty Street, New York, 5, New York; and that petitioners be permitted to be heard in the proceeding on behalf of stockholders.

MALCOLM S. MASON
55 Liberty Street
New York 5, New York

POTTER, LANGBEIN &
BURDICK
205 Datura Street
West Palm Beach, Florida
Attorneys for Petitioners

By /s/ Irwin L. Langbein
Of Counsel

STATE OF FLORIDA)
COUNTY OF PALM BEACH)

IRWIN L. LANGBEIN, being by the undersigned officer duly sworn, says on his oath:

That he is of counsel for the petitioners named in the foregoing petition; that he is authorized to make the foregoing petition and affidavit on their behalf; and that the statements made in the petition are true according to the best of his knowledge information and belief.

/s/ Irwin L. Langbein
Irwin L. Langbein

Sworn to and subscribed

before me this August 30, 1957

Julian A. Blake, Clerk
United States District Court

By Michael Oswald, Deputy Clerk

A. 88

IN THE UNITED STATES DISTRICT COURT IN AND FOR THE SOUTHERN DISTRICT OF FLORIDA MIAMI DIVISION

ORDER

Filed September 16, 1957

[TITLE OMITTED]

This matter being heard on the verified petition filed August 30, 1957, by Raymond M. Bukaty, Nathan D. Lobell and Irwin S. Mason as PROTECTIVE COMMITTEE FOR INDEPENDENT STOCKHOLDERS OF TMT TRAILER FERRY, INC., and the Court being satisfied from the allegations of the verified petition that petitioners have complied with all applicable laws relating to the activities and personnel of committees purporting to represent stockholders, it is ORDERED

1. That petitioners Raymond M. Bukaty, Nathan D. Lobell and Irwin S. Mason as PROTECTIVE COMMITTEE FOR INDEPENDENT STOCKHOLDERS OF TMT TRAILER FERRY, INC., be and they hereby are permitted to be heard in the proceeding, representing stockholders;

2. That petitioners Raymond M. Bukaty, Nathan D. Lobell and Irwin S. Mason as PROTECTIVE COMMITTEE FOR INDEPENDENT STOCKHOLDERS OF TMT TRAILER FERRY, INC. are hereby designated a person to receive notice of all matters arising in this proceeding; and it is further ORDERED

3. That any service of such notice to petitioners Raymond M. Bukaty, Nathan D. Lobell and Irwin S. Mason as PROTECTIVE COMMITTEE FOR INDEPENDENT STOCKHOLDERS OF TMT TRAILER FERRY, INC. be made upon Malcolm S. Mason, 55 Liberty Street, New York 5, New York and Potter, Langbein & Burdick, 205 Datura Street, West Palm Beach, Florida as petitioners' attorneys;

SO ORDERED at Miami, Florida September 16, 1957.

s/ George W. Whitehurst
District Judge

IN THE UNITED STATES DISTRICT COURT IN AND FOR THE SOUTHERN DISTRICT OF FLORIDA MIAMI DIVISION

APPLICATION FOR FEES AND REIMBURSEMENTS ON BEHALF OF COUNSEL FOR INDEPENDENT STOCKHOLDERS' PROTECTIVE COMMITTEE

Filed March 25, 1959

[TITLE OMITTED]

IRWIN L. LANGBEIN, being by the undersigned officer duly sworn, says on oath:

I have been a member of the bar of this Court since 1947, and I am also admitted to practice in New York and the District of Columbia and Florida. Malcolm S. Mason, Esq., of the New York bar, and I have acted since July 1957 as co-counsel for Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc. in the captioned reorganization. As appears by Mr. Mason's affidavit dated March 21, 1959, he has incurred herein recorded disbursements totaling not less than $997.04; and as appears by the schedules attached to this affidavit and hereby made part hereof, my law firm has incurred recorded disbursements herein totaling no less than $656.58. These disbursements do not include ten trips by personal automobile between West Palm Beach and Miami, nor the substantial expense of postage and stationery in repeatedly serving copies of documents upon some thirty addressees entitled to receive notices herein, nor any other office overhead.

Because Mr. Mason has not personally appeared before the Court, I have suggested to him that he state and indicate the nature of the time he has expended in this matter, viz., in excess of 485 hours, but for myself I rely on the fact that the record of this proceeding will corroborate the Court's own recollection of my participation in numerous conferences and hearings. Inasmuch as Mr. Mason's and my efforts on behalf of the stockholders did not result in the formulation of any reorganization plan which salvaged anything for them, we make no claim for compensation based on time expended, and we submit that the entire question of reasonable compensation for our services (other than reimbursement of disbursements) is a matter for the Court's discretion, in recognition of the need that some qualified persons undertake representation of the independent interests of the stockholders. Because of the broadcast charges made against the old management, of mismanagement and fraud, independent stockholder representation was a patent necessity in this reorganization. Mr. Mason's presence was required in the financial and governmental centers in the northeast to negotiate on the spot with governmental and financial interests in attempts to work up a reorganization plan; and my presence was required locally to attend hearings and to present the views of the independent stockholders committee. The Committee is applying for no compensation nor reimbursement.

Neither I nor any member of my law firm has at any time purchased, sold, or had any beneficial interest in the securities of the debtor. Nor have I made any agreement to share any compensation to be received from this Court with anyone, except that I have an oral understanding with Mr. Mason that whatever compensation Mr. Mason or

I may receive in this matter (over reimbursements of $656.58 herein applied for by me and $997.04 for Mr. Mason) should be divided on some fair basis to be determined; and any compensation that I may keep after that division will be treated as income of my law firm under my law firm's general partnership agreement.

s/ Irwin L. Langbein
IRWIN L. LANGBEIN

Sworn to and subscribed
before me this March
24, 1959

s/ M. Daphene Hatcher
Notary Public, State of Florida

My Commission expires:
Notary Public, State of Florida at Large

My commission expires Dec. 13 1960.
Bonded by American Surety Co. of N.Y.

Law Offices
Potter, Langbein and Burdick
205 Datura Street
West Palm Beach, Florida

(Attached to the foregoing:)

TMT EXPENSE BREAKDOWN

DATE	ITEM		AMOUNT	
7-26-57 Phone	NY	7-18	6.90	
			.69	7.59
8-30-57 Phone	Mmi C	7-23	1.30	
	Mmi-NY	7-29	8.50	
	NY		.65	
	MMI		.75	
	NY	8-1	9.60	
	Mmi	8-5	1.00	
	Mmi	8-6	.75	
	Mmi		.55	
	Jkvl	8-7	4.20	
	Mmi	8-9	.55	
			27.87	
			2.79	30.64

TMT EXPENSE BREAKDOWN (Cont.)

DATE	ITEM			AMOUNT	
8-31-57	Western Union				1.43
	Two round trips Mmi air				33.79
9-13-57	Brooks travel trip Mmi				5.34
	Trip Mmi				15.44
9-17-57	Refund air trip Mmi				—1.05
9-30-57	Phone	NY	8-26	9.75	
		Mmi	8-27	1.95	
		Mmi	"	.75	
		"	"	1.15	
		"	"	2.70	
		NY	8-28	4.50	
		"	8-29	1.70	
		MMiC	8-30	.55	
		"	9-4	2.20	
		"	"	.85	
		" C	9-11	.75	
		NY	9-12	5.55	
		"	9-16	2.85	
		Mmi	9-19	.75	
		"	9-20	.75	
		NY	9-22	3.80	
		Mmi	9-23	1.00	
		NY	9-23	5.55	
		"	"	5.55	
				52.65	
				5.27	57.92

TMT EXPENSE BREAKDOWN (Cont.)

DATE	ITEM		AMOUNT	
10-31-57	Western Union			1.60
10-26-57	Phone	MmiC	9-24	.55
		" "	"	.55
		Mmi-NY	"	6.00
		" "	"	7.50
		NY	9-26	8.70
		Mmi	10-3	1.00
		"	"	1.65
				25.95
				2.60 28.55

TMT EXPENSE BREAKDOWN (Cont.)

DATE	ITEM			AMOUNT
11-1	Refund air Miami			—1.89
11-12	" " "			—4.89
11-30	Phone	NY	10-30	7.35
		MMi	11-1	.85
		"	11-13	2.25
		"	"	1.95
		NY	"	4.20
		Mmi-NY	"	8.50
		" C	"	1.15
		Mmi-Corpus Christi	11-15	6.50
		Mmi-NY	"	2.50
		" "	"	2.50
		NY	"	6.95
		Mmi	"	1.00
		"	"	1.80
		"	"	.75
		"	"	.75
		"	11-18	4.15
		"	"	1.00
		Mmi	"	.75
		"	11-19	.75
		NDade C	"	.55
		Mmi C	"	.55
		"	"	.55
		NY	11-20	6.60
		Mmi	"	.80
		"	"	2.00
				66.70
				6.67 73.37

TMT EXPENSE BREAKDOWN (Cont.)

DATE	ITEM			AMOUNT
11-22 Trip Miami				11.49
11-15 " "				12.57
12-31 Phone	CG	11-29	2.25	
	NY	12-1	6.60	
	Mmi	"	2.70	
	"	"	2.40	
	"	12-2	.55	
	"	12-4	2.40	
	"	12-5	3.20	
	"	12-9	1.80	
	Lan	12-10	.75	
	NY	"	7.30	
	Mmi	"	.55	
	" C	"	.70	
	NY	12-15	4.50	
	"	12-20	6.25	
	Mmi	"	2.70	
	"	12-22	1.00	
	"	"	1.30	
	"	12-18	.55	
			47.50	
			4.75	52.25

TMT EXPENSE BREAKDOWN (Cont.)

DATE	ITEM		AMOUNT	
12-27 Phone	NY	12-27		5.60
1-28-58 Western Union				5.20
1-31-58 Phone	NY	12-26	2.40	
	"	12-27	7.10	
	Mmi	1-2	1.25	
	"	1-6	3.15	
	NY	"	9.60	
	Mmi	1-8	.60	
	Mmi-NY	"	5.00	
	" C	1-13	.55	
	"	"	6.00	
	Ftl-Mmi	1-14	.35	
	Mmi	1-25	.55	
	"	"	1.00	
	NY	1-13	3.10	
	Mmi	1-6	3.00	
			43.65	
			4.36	48.01

TMT EXPENSE BREAKDOWN (Cont.)

DATE	ITEM			AMOUNT
2-8	Hertz — to Miami			16.47
2-24	Western Union			3.36
2-28	Phone	Mmi-WPB	1-25	.55
		"	1-27	.75
		NY-Mi	1-30	2.50
		Mmi C	1-31	.55
		"	2-6	.75
		"	"	2.25
		NY	"	2.40
		Mmi	2-7	.75
		"	2-10	1.65
		NY	"	6.00
		Mmi	"	.60
		"	2-11	.70
		"	"	1.95
		"	"	2.10
		" C	"	1.15
		" "	"	.55
		"	2-12	.75
		"	"	.55
		"	"	1.00
		"	2-13	1.00
		NY	2-20	8.25
		Mmi	"	1.90
		"	2-21	.55
		"	"	.55
				39.75
				3.98
				43.73

TMT EXPENSE BREAKDOWN (Cont.)

DATE	ITEM		AMOUNT	
2-28 Western Union				3.60
3-31 Phone	NY	2-27	4.50	
	Mmi	"	1.50	
	"	"	1.00	
	"	3-3	.75	
	"	3-6	.55	
	"	3-7	.75	
3-31 Phone, cont'd	Mmi	3-7	.70	
	NY	3-9	6.60	
	Mmi	3-10	4.65	
	NY	"	5.55	
	"	3-16	1.70	
	Mmi	3-19	.75	
	"	"	1.50	
	"	3-20	1.65	
			32.15	
			3.22	35.37
5-30 Phone	Mmi	5-15	1.00	
			.10	1.10
9-25 Photostat				7.25
9-29 Phone	Mmi	9-23	.75	
	"	9-19	.75	
			1.50	
			.15	1.65

TMT EXPENSE BREAKDOWN (Cont.)

DATE	ITEM		AMOUNT	
10-31 Phone	NY	10-9	6.60	
	Mmi	10-16	1.50	
	" C	"	2.25	
	"	"	.75	
			11.10	
			1.11	12.21
11-26 Phone	Mmi	11-3	1.95	
	NY	11-4	2.75	
	"	11-6	1.35	
	"	"	6.25	
			12.30	
			1.23	13.53
11-31 Western Union				1.43
12-12 Mimeographing				8.96
12-22 Court reporter				9.80
12-31 Western Union				3.17
12-31 Phone	Mmi-WPB	11-20	.75	
	"	"	.40	
	"-NY	"	3.50	
	"-WPB	11-21	2.65	
	" "	11-25	.85	
	"	11-25	.70	
	NY	11-28	2.85	
	Mmi	12-1	.75	
	"	12-16	.70	
	NY	12-18	1.35	
			14.50	
			1.45	15.95

TMT EXPENSE BREAKDOWN (Cont.)

DATE	ITEM			AMOUNT
1-17-59	Mimeographing			11.59
1-31-59	Phone	WPB-NY	12-17	5.90
		" "	12-20	4.85
		NY	12-31	8.70
		"	1-4	6.95
		Mmi	1-5	.75
		"	"	.75
		Mmi	1-6	.75
		WPB-NY	1-8	1.70
		NY	"	3.30
		Mmi	"	.75
		Mmi C	1-8	.75
		NY	1-9	5.55
		Mmi	"	1.95
		"	1-16	1.00
		Wash-NY	1-20	1.65
				48.55
				4.86 53.41
2-2-59	Western Union	NY	1-7	1.66
		Mmi C	1-30	.90
				2.56
				.26 2.82

TMT EXPENSE BREAKDOWN (Cont.)

DATE	ITEM		AMOUNT	
2-28 Phone	NY	1-30	6.45	
	Mmi	2-6	1.25	
	"	2-17	2.50	
	NY	"	3.80	
	Mmi	2-18	1.00	
	"	2-21	4.65	
	"	2-23	.75	
	"	"	1.50	
	"	2-25	2.10	
			24.00	
			2.40	26.40
2-8 Western Union				1.82
				$656.58

IN THE UNITED STATES DISTRICT COURT IN AND FOR THE SOUTHERN DISTRICT OF FLORIDA MIAMI DIVISION

AFFIDAVIT IN SUPPORT OF APPLICATION FOR FEES

[Attached to Application for Fees and Reimbursements, on Behalf of Counsel for Independent Stockholders' Protective Committee — Filed March 25, 1959]

[TITLE OMITTED]

Malcolm S. Mason, being duly sworn, deposes and says:

1. I am a member of the Bar of the State of New York, having been admitted in March 1935. I am also a member of the Bar of the Supreme Court of the United States and of the United States District Court for the Southern District of New York. I maintain offices for the practice of law at 55 Liberty Street, New York 5, New York.

2. I was retained in July 1957 by the Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc. to represent the Committee and the interests of independent stockholders in the above-captioned action. I am associated in this matter with Irwin L. Langbein, Esq. of 205 Datura Street, West Palm Beach, Florida. I make this affidavit in support of an application for fees and disbursements.

3. By Order of this Court, dated September 16, 1957, the Committee was permitted to be heard in this proceeding representing stockholders.

4. On behalf of the Committee I have engaged in extensive communications with stockholders for the purpose of obtaining information useful in the protection of stockholders interests and of informing stockholders of the status and progress of the reorganization proceeding. I have made careful investigation of facts relating to the corporation, its history, the reasons for its inability to pay its debts as they matured and its financial condition. I have engaged in negotiations with potential investors in an effort to obtain fresh financing. I have made studies and research as to the probable effects of various reorganization plans submitted in this proceeding and of the law applicable to the various steps taken in these proceedings.

5. In the course of these activities I have paid or incurred in good faith out of pocket disbursements totalling not less than $997.04 as set forth in the annexed schedule labelled Schedule A and made a part hereof. This schedule does not include the cost of secretarial service which was substantial, nor any entertainment expense incurred in the course of various meetings for the purposes described, nor any general office costs. I have also devoted not less than 485 hours of work on not less than 290 days to this matter.

6. Since the independent stockholders represented by us did not obtain any position in the ultimate reorganization I understand that compensation for these services cannot be commensurate with the time and effort em-

ployed therein. For this reason I am not giving a detailed breakdown of these services unless the Court should desire it. In general, I have conferred in person and by telephone and communicated by mail with hundreds of stockholders. I have interviewed former employees of executive rank of the debtor corporation. I have negotiated with top level management of at least a dozen substantial concerns who expressed a serious and realistic interest in making investments of fresh money in the company on the basis of a recognition of a stockholders equity. I attended a special meeting of stockholders and opposed both then and in subsequent negotiations a proposed reorganization sponsored by management which would have resulted in a reorganization plan less beneficial to the estate than the one ultimately adopted. I have had numerous conferences with representatives of the principal creditors in an effort to work out reorganization arrangements satisfactory to both creditors and stockholders, (among others, the Ryder System, Rail-Trailer Co., Tri-Continental Financial Corporation, and Mr. Arthur Shaffer) and met with certain creditors and had extended telephone conferences with officials of the Maritime Administration and others in an effort to preserve the interest of the debtor in the Carib Queen. I have communicated with officials of the Puerto Rican government and with business concerns having business with Puerto Rico in order to lay a foundation for a projection of earnings, and in order to assist if possible the obtaining of new business after a reorganization.

7. All of these activities were undertaken in the belief in good faith that they would prove beneficial to the debtor estate and to the interests of independent stockholders, and that belief, I respectfully submit, was a reasonable one under the circumstances at the time. Although

no specific benefit was achieved for the independent stockholders, I believe that these activities did play a part in the whole complex of activities tending to benefit the debtor estate.

8. During the pendency of this matter I have neither bought nor sold any securities of TMT Trailer Ferry, Inc., nor any beneficial interest therein. On information and believ, none of the members of the Committee has bought or sold any such securities or interest therein.

s/ Malcolm S. Mason
MALCOLM S. MASON

Sworn to before me this
21st day of March 1959.

s/ Harry A. Goidel
HARRY A. GOIDEL
Notary Public, State of New York
No. 31-6553610
Qualified in New York County
Commission Expires March 30, 1960

Attached hereto as "Schedule A Annexed to and Made Part of Affidavit of Malcolm S. Mason", which Schedule is also attached and made a part of Supplementary Affidavit in Support of Application for Fees, filed March 30, 1959, and which is contained hereinafter in this Appendix of Appellee.

IN THE UNITED STATES DISTRICT COURT IN AND FOR THE SOUTHERN DISTRICT OF FLORIDA MIAMI DIVISION

AFFIDAVIT CONCERNING DIVISION OF FEES

Filed March 25, 1959

[TITLE OMITTED]

Malcolm S. Mason, being duly sworn, deposes and says:

1. I was retained in July 1957 by the Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc. to represent the Committee and the interests of independent stockholders in the above-captioned action. I am associated in this matter with Irwin L. Langbein, Esq. of 205 Datura Street, West Palm Beach, Florida. I make this affidavit in support of an application for fees and disbursements.

2. I have not shared or agreed to share my compensation for services in this matter with any person not contributing hereto, nor shared nor agreed to share in the compensation of any person rendering services in this matter to which services I have not contributed. No agreement or understanding exists between me and any other person for a division of compensation in this matter except that I have an oral agreement with Mr. Langbein,

pursuant to which we have cooperated in the representation of the interests of independent stockholders in this matter, providing that any compensation received in excess of reimbursement of disbursements shall be shared between us on an equitable basis to be then determined and agreed upon.

s/ Malcolm S. Mason

MALCOLM S. MASON

Sworn to before me
this 24 day of March 1959.

s/ Nettie J. Zimmerman

NETTIE J. ZIMMERMAN
Notary Public, State of New York
No. 31-9804500
Qualified in New York County
Commission Expires March 30, 1960

IN THE UNITED STATES DISTRICT COURT IN AND FOR THE SOUTHERN DISTRICT OF FLORIDA MIAMI DIVISION

SUPPLEMENTARY AFFIDAVIT IN SUPPORT OF APPLICATION FOR FEES

Filed March 30, 1959

[TITLE OMITTED]

Malcolm S. Mason, being duly sworn, deposes and says:

Supplementing the Schedule of expenses annexed to my affidavit sworn to March 21, 1959, I have prepared a more detailed schedule annexed hereto as Supplementary Schedule A, and made a part hereof. Disbursements incurred or paid by me in this matter are not less than the amounts shown in the annexed schedule. In the course of preparing this more detailed schedule, I discovered some minor errors of allocation in the previous schedule which have been corrected in this schedule. These corrections do not affect the total and do not involve changes of items totalling more than ten dollars in either direction.

s/ Malcolm S. Mason

Malcolm S. Mason

Sworn to before me this
24 day of March 1959.
s/ Nettie J. Zimmerman

Nettie J. Zimmerman
Notary Public, State of New York
No. 31-9804500
Qualified in New York County
Commission Expires March 30, 1960

SUPPLEMENTARY SCHEDULE A ANNEXED TO AND MADE PART OF AFFIDAVIT OF MALCOLM S. MASON

1957

July	5	West Palm Beach — Irwin L. Langbein, Esq.	7.26
1	13	West Palm Beach — Langbein	12.27
	18	Binghamton N.Y. — Bukaty, member of Protective Committee	2.20
	22	Brentwood, N.Y. — Posen, representative of group of stockholders	1.05
	25	West Palm Beach — Langbein	21.95
July		Local telephone calls, principally to stockholders	28.00
	15	Duplicating 2-page letter to stockholders (350 copies)	70.00
	16	Mailing letter to stockholders	16.94
July		Other postage	2.00
			161.67

SUPPLEMENTARY SCHEDULE A (Cont.)

Aug.	3	Burlington, Vt. to President of Canal-Randolph	.88
	5	Pittsfield, Mass. to N.Y. to Arthur Shaffer	1.10
	5	Pittsfield, Mass. to N.Y. to Eugene P. Smith, Maritime Consultant, Reynolds Metals Co.	.94
	12	Brentwood, N.Y. to Posen	.61
	27	West Palm Beach — Langbein	5.10
	28	Chicago, to Ryan, President of Rail Trailer Co.	8.03
	28	West Palm Beach — Langbein	9.57
	28	Miami — Eric Rath, President of TMT	7.16
	29	West Palm Beach — Langbein	3.13
Aug.		Local telephone calls, principally to stockholders	20.00
Aug.		Postage	3.00
			59.52

SUPPLEMENTARY SCHEDULE A (Cont.)

Sept. 19	West Palm Beach — Langbein	11.05
20	West Palm Beach — Langbein	6.10
21	West Palm Beach — Langbein	14.03
21	Colonie, N.Y. to Suther, representative of group of stockholders	2.09
24	Miami — Langbein	10.45
24	Miami — Langbein	4.95
24	Washington, D.C. — Securities & Exchange Commission	8.69
28	Pottstown, Pa. to President of Atlantic Aviation Co.	2.31
30	West Palm Beach — Langbein	11.11
30	Smyrna, Del. to N.Y. — Reynolds Metals Co.	2.53
Sept.	Local telephone calls	18.00
Sept. 21	Duplicating 2-page letter to stockholders (300 copies)	60.00
21	Mailing letter to stockholders	11.19
Sept.	Other postage	2.00
Sept. 30	Travel to Dover, Del. to attend special meeting of stockholders	20.00
		184.50

SUPPLEMENTARY SCHEDULE A (Cont.)

Oct.	3	Richmond, Va. to West Palm Beach — Langbein	6.71	
Oct.		Local telephone calls	12.00	
Oct.		Postage	1.00	
Oct.	2-3	Travel to Richmond, Va. for conference with principal executives of the Reynolds Metals Co.	53.05	
				72.76
Nov.	8	Boyertown, Pa. to President of Atlantic Aviation Co.	1.81	
	12	West Palm Beach — Langbein	12.54	
	14	West Palm Beach — Langbein	14.52	
	16	N.Y.-Corpus Christi, to Admiral Clark	7.65	
	18	West Palm Beach — Langbein	9.08	
	19	West Palm Beach — Langbein	2.64	
	19	Miami — Langbein	3.35	
	28	West Palm Beach — Langbein	6.49	
Nov.		Local telephone calls	7.40	
Nov.	21	Duplicating letter to stock-holders (300 copies)	30.00	
	21	Mailing letters to stock-holders	10.19	
Nov.		Other postage	1.00	
				106.67

SUPPLEMENTARY SCHEDULE A (Cont.)

Dec.	3	Wash. D.C., Securities & Exchange Com.	4.45
	3	West Palm Beach — Langbein	9.57
	3	West Palm Beach — Langbein	6.49
	4	West Palm Beach — Langbein	8.42
	5	West Palm Beach — Langbein	9.08
	5	Wash. D.C., Securities & Exchange Com.	6.05
	8	West Palm Beach — Langbein	8.42
	9	West Palm Beach — Langbein	10.07
	11	Wash. D.C., Securities & Exchange Com.	1.87
	15	West Palm Beach — Langbein	4.57
	21	West Palm Beach — Langbein	9.24
	27	N.Y.-Phila. Pa. to Leacock, representative of investors group	2.25
Dec.		Local telephone calls	5.00
Dec.		Postage	1.00
			86.48

SUPPLEMENTARY SCHEDULE A (Cont.)

1958			
Jan.	5	West Palm Beach — Langbein	6.11
	6	Wash. D.C., Securities & Exchange Com.	3.41
	6	Miami to Russo, Ryder System	15.40
	7	West Palm Beach — Langbein	7.70
	7	West Palm Beach — Langbein	4.13
	7	Wash. D.C., Securities & Exchange Com.	3.19
	7	Miami to Russo, Ryder System	12.65
	7	Wash. D.C., Securities & Exchange Com.	2.31
	8	Wash. D.C., Securities & Exchange Com.	1.87
	8	Miami to Russo, Ryder System	7.70
	10	West Palm Beach — Langbein	14.03
	10	Boyertown, Pa. to Atlantic Aviation Co.	1.32
	10	Pottstown, Pa. to Atlantic Aviation Co.	.83
	12	West Palm Beach — Langbein	4.57
	13	Wash. D.C., Securities & Exchange Com.	2.53
	13	Boyertown, Pa. to Atlantic Aviation Co.	.83
	22	Wash. D.C., Securities & Exchange Com.	3.41
	22	Pottstown, Pa. to Atlantic Aviation Co.	1.54
	22	Miami to Castle Jordan, Ryder System	8.97
	23	Wash. D.C., Securities & Exchange Com.	2.75
Jan.		Local telephone calls	7.80
Jan.		Postage	1.00
			114.05

SUPPLEMENTARY SCHEDULE A (Cont.)

Feb.	3	Miami to Castle Jordan, Ryder System	6.05
	3	Miami to Castle Jordan, Ryder System	4.95
	6	West Palm Beach — Langbein	6.11
	7	West Palm Beach — Langbein	6.11
	10	Miami to Castle Jordan, Ryder System	5.50
	10	Wash. D.C., Securities & Exchange Com.	1.87
	10	Wash. D.C., Maritime Commission	3.19
	10	Wash. D.C., Maritime Commission	2.97
	10	West Palm Beach — Langbein	7.10
	14	Miami to Castle Jordan, Ryder System	6.77
	14	West Palm Beach — Langbein	7.65
	14	Wash. D.C., Securities & Exchange Com.	2.75
	14	Wash. D.C., Maritime Commission	5.61
Feb.		Local telephone calls	3.50
Feb.		Postage	1.00
			71.13

SUPPLEMENTARY SCHEDULE A (Cont.)

Mar. 11	Atlanta, Ga. to Castle Jordan, Ryder System	11.55	
Mar.	Local telephone calls	3.50	
Mar.	Postage	1.00	
			16.05
Apr. 2	Miami to Castle Jordan, Ryder System	4.40	
Apr.	Local telephone calls	1.50	
Apr.	Postage	1.00	
			6.90
May 11	Wash. D.C., Securities & Exchange Com.	2.15	
May	Local telephone calls	1.00	
May	Postage	1.00	
			4.15
June	Local telephone calls	1.50	
June	Postage	1.00	
			2.50
July	Local telephone calls	1.00	
July	Postage	1.00	
			2.00
Aug.	Local telephone calls	1.00	
Aug.	Postage	1.00	
			2.00

SUPPLEMENTARY SCHEDULE A (Cont.)

Sept.	14	West Palm Beach — Langbein	4.95	
	15	West Palm Beach — Langbein	2.26	
	23	West Palm Beach — Langbein	2.64	
	14	Balt. Md. to Desser, Chem-Oil Co.	1.15	
Sept.		Local telephone calls	1.50	
Sept.		Postage	1.00	
				13.50
Oct.	10	Boyertown, Pa. to Atlantic Aviation Co.	.83	
	10	Baltimore, Md. to Desser, Chem-Oil Co.	2.09	
	12	Pottstown, Pa. to Atlantic Aviation Co.	.66	
	17	Miami — Langbein	7.70	
	17	Balt. Md. to Desser, Chem-Oil Co.	1.27	
Oct.		Local Telephone calls	1.20	
Oct.		Postage	1.00	
				14.75
Nov.	2	West Palm Beach — Langbein	5.72	
	6	West Palm Beach — Langbein	12.05	
Nov.		Local telephone calls	1.80	
Nov.		Postage	1.00	
				20.57

SUPPLEMENTARY SCHEDULE A (Cont.)

Dec.	15	West Palm Beach — Langbein	6.11
	16	West Palm Beach — Langbein	5.34
	18	West Palm Beach — Langbein	8.03
	21	Pottstown, Pa. to Atlantic Aviation Co.	.94
	24	West Palm Beach — Langbein	6.60
Dec.		Local telephone calls	1.00
Dec.		Postage	1.00
			29.02

1959

Jan.	5	West Palm Beach — Langbein	7.65
	7	Phila. Pa. to Zink, attorney for investors group	2.42
		Tgm. West Palm Beach — Langbein	1.88
	27	Balt. Md. — Langbein	1.43
Jan.		Local telephone calls	2.00
Jan.		Postage	1.00
			16.38

SUPPLEMENTARY SCHEDULE A (Cont.)

Feb.	9	Boyertown, Pa. to Atlantic Aviation Co.	.83	
	18	Boyertown, Pa. to Atlantic Aviation Co.	.83	
	20	West Palm Beach to Juviler, Thompson-Starrett Co.	3.14	
Feb.		Local telephone calls	1.50	
Feb.		Postage	2.50	
				8.80
Mar.	12	Boyertown, Pa. to Atlantic Aviation Co.	1.32	
	18	Boyertown, Pa. to Atlantic Aviation Co.	1.32	
Mar.		Local telephone calls	.50	
Mar.		Postage	.50	
				3.64
		TOTAL		$997.04

IN THE UNITED STATES DISTRICT COURT IN AND FOR THE SOUTHERN DISTRICT OF FLORIDA MIAMI DIVISION

STATEMENT OF TIME AND DISBURSEMENTS OF COMMITTEE COUNSEL

Filed October 14, 1968

[TITLE OMITTED]

This statement is filed pursuant to ¶3 of the Court's "Order on Mandate" of August 16, 1968, as modified by telegraphic order of August 28, 1968.

In March 1959 after confirmation of Plan I, we filed an application for fees and disbursements. This application was denied; we appealed. Thereafter in December 1960, to avoid deflection of effort better expended on matters more central to the reorganization, we withdrew the appeal pursuant to approved stipulation, without prejudice to renewal.

We now renew and incorporate herein that application. As there recited Malcolm S. Mason had devoted not less than 485 hours on not less than 290 days to this matter and had incurred disbursements of not less than $997.04. Irwin L. Langbein had devoted time not specified in that application but in fact not less than 241-¾ hours on not less than 185 days and had incurred disbursements of not less than $656.58.

Since confirmation of Plan I in 1959, counsel have been engaged in active opposition to that reorganization plan and to two others which likewise erroneously

eliminated the stockholder interest. This has required presentation of our contentions in the District Court, careful scrutiny of the effect of certain of the trustee's operations, further investigation, presentation and proffer of evidence in the District Court, as well as litigation in appellate courts.

Litigation however has been kept to a minimum. Mindful of costs, counsel have avoided interlocutory appeals wherever possible but left no doubt with all parties as to committee positions with respect to issues. Counsel have also avoided duplicative or unnecessary pleadings. Since each such decision was taken at our peril, particular care and study was needed for each decision not to act as well as for each decision to act.

The listing below of the hearings attended and the pleadings prepared by counsel, April 1959 (i.e., after our initial application) through June 1968, and of those documents of other parties that required more than casual consideration, is only partial evidence of counsel's total work on behalf of stockholders. Our communications with stockholders continued throughout. Investigation and research of facts continued through 1966 — of the M-S claim, of causes of action against M-S, of market-rigging by S-S, of economic facts for valuation, of the stock transactions on which stockholders proof of claim to creditor treatment is based, of the Pauline Golding claim. Our negotiations continued through 1965 with potential sources of reorganization capital such as the Reynolds Metals interests, U.S. Freight, Allen & Co., Bull Line, Eastern Gas & Fuel, Trans Caribbean Airways, and many others; and towing companies Moran and McAllister. Likewise negotiations for settlement, originally with the trustee in 1961 but

broken off, were resumed with creditors and continued through 1965. Through 1966 we continued study and research of certain aspects of the trustee's conduct of the business, such as availability of vessels and financing, towing contracts.

Legal research on specific issues and consultation on litigation tactics has been required throughout: for proceedings in the District Court, for briefs and arguments in three appeals to the Court of Appeals, for certiorari proceedings and briefs and arguments after grant of certiorari before the Supreme Court of the United States.

The present application, as detailed below, seeks an interim allowance of partial compensation for services taken to a cut-off date of June 30, 1968 (i.e. roughly to resumption of District Court proceedings on remand from the Supreme Court and Court of Appeals), and reimbursement of disbursements recorded to August 31, 1968.

1959 — April through December

The major litigation activities of 1959; preparation of appeal from Plan I, joinder in interim trustee Worton's unsuccessful attempt to vacate the plan for collusion between M-S and S-S, successful defense against trustee Anderson's attempt to dismiss appeal and consummate the plan.

Committee pleadings, participation in hearings	Documents by other parties requiring extended consideration (i.e. excluding documents served and cursorily reviewed)

4/3 Notice of appeal by U.S. from approval and confirmation of plan

4/6 Order appointing Worton successor trustee to Anderson who resigned to become president

4/17 Notice of appeal from confirmation of plan

6/16 Trustee Worton's petition for rule to show cause why plan should not be vacated

6/23 Motion for extension of time to docket appeal

7/3 SEC statement of position: order of confirmation void for lack of valid acceptances—lack of notice prejudicial to stockholders and other creditors — §167 investigation required

7/7 Joinder in trustee's petition reacceptance not in good faith and objection to hearing held without notice

7/8 Order appointing Anderson general manager

7/10 Memorandum of Tri-Continental Corp.

7/10 Order denying rule to show cause

7/24 Trustee Worton's notice of appeal

8/4 Order directed to creditors for hearing Aug. 14

8/5 Order granting trustee's motion to dismiss his appeal

8/12 Statement of position on order to creditors and hearing Aug. 14

8/12 SEC objections to creditors' petition and hearing Aug. 14

8/12 Response of Tri-Continental to order directed to creditors

8/27 Motion for extension of time docket appeal

8/28 Order removing Worton as trustee and reinstating and appointing Anderson successor

9/29 Motion for extension of time docket appeal

11/5 Motion for extension of docket appeal

11/5 Trustee Anderson's motion to dismiss committee appeal as frivolous

11/10 Order amending plan: settlement of U.S. claim and withdrawal of U.S. appeal

11/13 Trustee's reply to motion for extension of time

11/25 SEC objections to Trustee's motion

12/9 Designation of record for appeal

12/9 Statement of points on appeal

12/14 Trustee petition to require $10,000 appeal bond: committee has no standing to

12/22 Hearing

12/30 Stipulation with trustee for extension time to file record

12/31 S-S petition for leave appeal to consummate plan

DISBURSEMENTS: total not less than $489.23

Mason:

long distance phone tolls and wires	$ 86.15
printing, mimeo and bulk postage	44.80
	130.95

Langbein:

long distance phone tolls and wires	158.78
travel	139.58
printing, mimeo and bulk postage	37.07
miscellaneous	22.85
	$358.28

TIME: total not less than hrs. 230-½

Mason: not less than 141 hours on 110 days

Langbein: not less than 98-½ hours on 76 days

1960

The major litigation activities of 1960: the trustee's investigation and report, vacation of the plan; preparation of the committee's appeal and the consolidated S-S's cross-appeal; work on reorganization plans

Committee pleadings, participation in hearings	Documents by other parties requiring extended consideration (i.e., excluding documents served and cursorily reviewed)
	1/8 S-S motion to withdraw petition to consummate
	" Trustee's petition for approval of date of Jan. 1 1960 as vesting title in reorganized corporation
	" SEC objections to S-S petition to consummate
	" SEC petition for order directing trustee a) not to consummate plan; b) to make §167 investigation, and affidavit corroborating committee charges against S-S group
	1/13 S E C objection to trustee motion to vest title
	1/14 Trustee's designation of record for appeal
1/15 Hearing	1/15 Tri-Continental's objections to trustee's motion to consummate plan
1/22 Hearing	

1/22 Order for investigation

1/23 Motion for extension time

1/29 Hearing

2/3 Joint motion for extension time

Hearings New York and Miami: 2/23, 24, 25, 26; 3/3, 4/29/30; 4/7

4/22 Joint stipulation for extension time

6/29 Joint stipulation for extension time

7/1 Trustee's report of investigation: establishes major frauds against S-S group, identity of S-S principals as company wreckers, relation of frauds to Securities Acts violations and recommends disallowance / subordination of S-S claims, counterclaims and crossuits against S-S principals, withdrawal of plan

7/14 Hearing

7/14 S-S answer

7/18 Memorandum on trustee's report of investigation: inter alia, failure to investigate M-S liability

8/8 Trustee motion for remand of committee appeal

8/12	Hearing		
		8/15	S-S notice of appeal
8/24	Memorandum in comment on trustee's motion for remand	8/16	Trustee motion to dismiss committee appeal as moot
8/25	Motion for extension time pending trustee's motion dismiss appeal		
8/25	Objection to trustee's motion dismiss appeal		Trustee's answer
9/22	Stipulation for dismissal of appeal (for denial of fees and reimbursements)	11/8	Special report of trustee: business operations, new terminal facilities

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DISBURSEMENTS: total not less than $429.27

Mason:

long distance phone tolls and wires	$ 99.14
printing, mimeo and bulk postage	24.80
	124.24

Langbein:

long distance phone tolls and wires	57.23
printing, mimeo and bulk postage	21.44
travel	226.36
	$305.03

TIME: total not less than hrs. 480

Mason: not less than 243-½ on 206 days

Mason, Irma: not less than 74 hours on 14 days
Langbein: not less than 162-½ hours on 91 days

1961

The major activities of 1961: the appeal from Plan 1 consolidated with S-S's appeal from vacation of Plan I (the printed record is 534 pages, the committee's brief 52 pages, the trustee's brief 50 pages, S-S's brief 56 pages; the SEC filed a brief and Allied Assets (formerly Tri-Continental) filed a brief and reply brief. The case was orally argued in New Orleans; the objections to the S-S and M-S claims, the assertion of the stockholders claim under the federal securities laws.

Committee pleadings, participation in hearings		Documents by other parties requiring extended consideration (i.e., excluding documents served and cursorily reviewed)
	1/13	Trustee's objections to S-S claim, Trustee's petition re auditors and increased towing costs
	"	S-S designation of record
1/20 Joint stipulation on agreed statement of facts for the record on appeal (committee, trustee S-S)	1/20	Trustee designation of record
	"	S-S motion for leave to file prohibition or mandamus

1/24 SEC objections to S-S and M-S claims

2/1 Trustee's additional objections to S-S

2/6 Order appointing special master to hear lien claims and objections including S-S and M-S claims

" S-S notice of appeal from order appointing special master

3/21 Statement of position proffered re matters pending before special master: joins in trustee's objections to S-S claim, objects to M-S claim and requests investigation, asserts stockholders rights under federal securities laws

3/30 Stipulation time to file briefs

" Reply to S-S motion to enlarge time for oral argument

4/6 Notice of hearing on committee petition to file statement of position

4/10 Trustee petition to buy trailers

4/17 S-S brief

4/20 Trustee petition to sell vessel Cuba and purchase another

4/21 Hearing

4/26 Order denying Committee leave to file statement of position

5/5 Trustee petition re feasibility study of vessels

5/9 Brief

5/9 Trustee's brief, Allied brief, SEC brief

5/26 Allied reply brief

5/30 Oral argument New Orleans

7/1 Trustee special report

7/25 Hearing

8/3 S E C specifications and objections to M-S claim

8/18 S-S petition for rehearing

8/24 S-S motion for stay of mandate pending petition for certiorari

8/29 Trustee petition for reference to special master of SEC objections to M-S claim

9/1 M-S' answer to SEC specifications

9/14 Hearing

11/13 S-S petition for certiorari

11/16 Trustee petition purchase trailers

12/7 Brief in opposition to certiorari

12/16 Special Master's report on vessel valuation

	12/26 Trustee's exceptions to special master's report
	12/27 Trustee's motion to allow M-S claim in full amount
12/28 Hearing	12/28 S-S objections to allowance of M-S claim

DISBURSEMENTS: total not less than $2,362.94

Mason:

long distance phone tolls and wires	$ 143.11
travel (N.Y. to W.P.B.; N.Y. to N.O., Wash. and N.Y.)	898.69
printing, mimeo and bulk postage	125.01
miscellaneous	20.00
	1,186.81

Langbein:

long distance phone tolls and wires	280.11
travel	509.81
printing, mimeo and bulk postage	358.51
miscellaneous	27.70
	1,176.13

TIME: total not less than hrs. 1042-¾

Mason, M: not less than 565-½ hours on 155 days

Mason, I: not less than 221 hours on 31 days

Langbein: not less than 256-¼ hours on 104 days

A. 135

1962

The major activities of 1962: investigation and analysis of M-S claim and liability; valuation studies; work on re-organization plans, proposed and potential; suggestions and amendments to plans, stocktracing for proof of claim; settlement negotiations; appeal from Plan II.

Committee pleadings, participation in hearings

1/23 Objections to M-S claim; granted time to supply specifications

2/12 Specifications of objections to M-S claim (wider and more specific than SEC objections: 34 pages)

Documents by other parties requiring extended consideration (i.e., excluding documents served and cursorily reviewed)

1/18 U.S. objections to allowance of M-S claim

1/26 Order granting Pottharst motion to intervene and file plan

2/1 Report of creditors committee on debtor

2/13 Trustee's statement of condition of debtor

2/16 SEC statement in support of committee: M-S must sustain burden of proof

3/6 Order for valuation hearings in view of trustees intention to recommend a plan of re-organization

3/ Report of creditors committee on plans

3/30 Suggestions for formulation of a plan

4/17 Notice of taking deposition of trustee

4/20 Hearing

4/24 Valuation hearing
4/25 Valuation hearing
5/2 Hearing

5/22 Letter to trustee's counsel asserting stockholders right to creditor treatment

3/30 Plan of reorganization suggested by certain major creditors of debtor

4/9 Trustee report on plans recommends internal plan

4/ Creditors committee on plans

4/11 Creditors committee report on cash bid

4/17 Creditors committee report on U. S. Freight plan

4/18 Trustee motion to suppress deposition

4/20 Trustee report on cash bid (U. S. Freight)

4/23 Trustee report on cash bid (Pottharst)

5/16 Amended plan suggested by certain major creditors

" Trustee summary of plans

5/29 Letter from trustee's counsel advising committee suggestion to put in form of proposed amendment

6/1 Trustee petition to purchase forth vessel

6/18 SEC advisory opinion: plans not fair and equitable

6/18 Plan amendments proposed in accordance with trustee's counsel's advice

" Proof of claim by stockholder

" Proof of claim on behalf of stockholders

6/20 U.S. objections to approval of plans

7/11 Opinion and order on valuation and insolvency

" Opinion and order approving plans of reorganization

7/13 Creditors committee report on proposed plan

7/27 Notice of appeal from order of insolvency

8/6 Trustee report on acceptance of plan

8/9 SEC objections to confirmation of plan

8/10 Hearing

8/10 U.S. objection to confirmation of plan

8/28 Trustee petition for order denying U.S. priority and confirming internal plan

9/5 Application extension time re appeal

9/7 Statement of points on appeal

9/17 Application for stay of proceedings on interlocutory appeal pending entry of order of confirmation of plans

9/21 Hearing

9/28 Order denying U.S. priority status and denying confirmation pending prompt appeal

10/2 Amended Pottharst plan

10/7 Trustee response

10/26 Notice of appeal by U.S.

10/31 Stipulation for deferred record printing

11/15 Trustee petition re operations of debtor: additional trailers terminals, towing contract increase

11/23 Hearing

11/23 SEC motion dismiss committee appeal from interlocutory order

12/ Reply to SEC motion and renewal of application for stay

12/14 Hearing

12/14 Trustee petition to renew towing contract for three years

12/ Trustee response to SEC motion

12/21 SEC motion denied but appeal stayed until confirmation order

12/28 Trustee motion amend plan and for confirmation

"	Order amending plan and fixing hearing date for confirmation	

DISBURSEMENTS: total not less than $1,440.78

Mason:	
long distance phone tolls and wires	$245.59
printing, mimeo and bulk postage	74.69
travel (Wash. and Miami)	185.12
miscellaneous	310.00
	815.40
Langbein:	
long distance phone tolls and wires	233.76
printing, mimeo and bulk postage	57.58
travel	235.04
miscellaneous	99.00
	625.38

TIME: total not less than hrs. 1122

Mason, M.: not less than 693 hours on 210 days

Mason, I.: not less than 182 hours on 27 days

Langbein: not less than 247 hours on 148 days

1963

The major activity of 1963: the appeal from Plan II — the mimeographed record (consolidated with the record on the U.S. appeal) is in five volumes of over 1,100 pages — the committee's brief is 66 pages long, four other briefs were filed (64-79 pages each). The committee's reply

brief is 18 pages and supplementing brief (requested by the Court of Appeals) is 26 pages; trustee, SEC and Allied also filed reply and supplementary briefs. Subsidiary motions in the Court of Appeals to prevent consummation pending decision on the appeals and to expedite the appeal were also filed.

Committee pleadings, participation in hearings	Documents by other parties requiring extended consideration (i.e., excluding documents served and cursorily reviewed)
	1/23 Notice of Appeal by U.S.
2/4 Hearing	2/4 SEC further objections to confirmation
	2/13 Pottharst objection to proposed order of confirmation
	2/14 Order confirming internal plan
2/25 Notice of appeal from consummation	2/25 U.S. notice of appeal from confirmation
	3/4 Order extending time file record and docket appeal
	3/5 Trustee motion for consummation plan
	" SEC objection to consummation
3/15 Objection to consummation	3/24 Order in aid of consummation
3/28 Statement of points on appeal	

" Stipulation re appeal record

4/15 Hearing

4/16 Renewal of petition for leave to file statement of position

" Opinion re extension of time docket appeal

4/17 Appeal record designation

4/12 U.S. statement of points on appeal

4/18 U.S. notice of appeal from order in aid of consummation

4/19 Trustee appeal record designation

4/23 U.S. motion for stay

4/26 Hearing

4/29 U.S. Designation of record

" Trustee petition for substantial consummation

5/ Joinder in SEC motion for stay

5/ Objection to motion for consummation

5/2 SEC motion for stay pending appeals

5/10 U.S. objection to substantial consummation

5/16 Order authorizing completion of consummation

5/24 Motion for stay of order of consummation

5/25 SEC brief in support of stay

5/31 Trustee brief in opposition to motion for stay

	6/6 Court of Appeals order of stay pending appeals
	6/15 Allied motion to condition stay on prompt filing of record and briefs
	6/26 Trustee joinder in motion to expedite appeals
	6/28 SEC response to Allied motion to condition stay
6/29 Statement of position re all motions	
7/12 Designation for printing record	
8/2 Hearing	
	9/ SEC brief (61 pages)
	10/1 U.S. Brief (76 pages)
10/3 Brief	
10/25 Stipulation re exhibits	
	11/1 Allied brief (74 pages)
	11/3 Trustee brief (79 pages)
11/16 Reply brief	11/ SEC reply brief (22 pages)
11/20 Oral argument	
12/9 Supplementary brief	
	12/10 Allied supplementary brief (18 pages)
	12/11 SEC supplementary brief (8 pages)
	" Trustee supplementary brief

* * *

DISBURSEMENTS: total not less than		$3,194.54
Mason:		
long distance phone tolls and wires	$151.69	
travel (N.Y. to W.P.B.; N.Y. to N.O.)	744.98	
printing, mimeo and bulk postage	1,528.97	
	2,425.64	
Langbein:		
long distance phone tolls and wires	458.93	
travel	152.90	
printing, mimeo and bulk postage	44.77	
miscellaneous	112.30	
	$768.90	

TIME: total not less than hrs. 847

Mason, M.: not less than 439 hours on 166 days

Mason, I: not less than 177 hours on 30 days

Langbein: not less than 231 hours on 11 days

1964

The major activity of 1964: attempt to obtain clarification of Court of Appeals decision; refusal of this clarification left subsequent proceedings in "erroneous legal perspective" 88 S.Ct. 1157, 1163; settlement negotiations instituted on behalf of major creditors; further investigation and study of M-S participation in fraud; and attempt to obtain discovery with respect thereto; opposition to renewal of towing contract; participation in feasibility hearing.

Committee pleadings, participation in hearings	Documents by other parties requiring extended consideration (i.e., excluding documents served and cursorily reviewed)
	2/ Trustee petition to purchase vessel
	3/ Trustee petition for approval of towing contract
3/13 Hearing	
	4/ Trustee petition buy trailers
	6/ Trustee report on status of appeals and business of debtor
	6/8 Court of Appeals decision
	6/25 SEC petition for rehearing or clarification
6/27 Joinder in SEC petition	
	7/22 Trustee petition for certiorari
8/20 Motion for stay of mandate	
	10/ Trustee petition for hearing on feasibility
11/4 Hearing	
	11/ Outline of settlement from Allied
	12/ Trustee petition for approval of towing contract
12/21 Motion for production of documents	

DISBURSEMENTS: total not less than $252.30

Mason:

long distance phone tolls and wires $98.18

Langbein:	
long distance phone tolls and wires	114.39
travel	31.11
printing, mimeo and bulk postage	3.62
miscellaneous	5.00
	$154.12

TIME: total not less than hrs. 355-½
Mason, M.: not less than 184-½ hours on 104 days
Mason, I.: not less than 102-½ hours on 21 days
Langbein: not less than 68-½ hours on 59 days

1965

The major activity of 1965: research resulting in the request for admissions; the trustee's attempt to consummate and dismiss the committee's appeal; the appeal from Plan III—the mimeographed record is 416 pages, the committee's initial brief is 62 pages.

Committee pleadings, participation in hearings	Documents by other parties requiring extended consideration (i.e., excluding documents served and cursorily reviewed)
	1/6 Trustee petition re towing contract
1/18, 19 Hearing	1/18 Order approving towing contract
	1/21 Order denying motion to produce
2/28 Notice of appeal—towing contract	
" Notice of appeal—denial of production	
	3/8 Trustee petition for additional equipment

3/15 Hearing
" Objection to approval of plan
3/26 Motion for extension time for appeal
4/19 Hearing
" Request for admission

5/5 Notices of appeals—confirmation
5/14 Hearing

5/24 Points on appeal
" Stipulation: designating consolidated record on appeals
" Appealbond

3/9 SEC advisory report on plan
3/19 Opinion and order of approval of plan

4/15 Trustee report on acceptances of plan
" SEC objections to confirmation of plan
4/23 Order of confirmation
5/5 Trustee petition for consummation

5/21 Order discharging committee
5/24 Order in aid of consummation

6/7 SEC motion to stay issuance of stock
6/ Trustee petition to renew Mesco lease
6/17 Trustee —
memo in opposition to stay
motion to dismiss appeals
motion to affirm District Court Orders
memo in support of motions

6/21 Notice of appeal: consummation committee discharge

6/21 Statement of points on additional appeal

6/22 Response to SEC motion to stay issuance of stock

6/30 Stipulation re extension time

7/2 SEC response to trustee motion to dismiss

7/11 Reply to trustee's motion to dismiss

" Affidavit of M. Mason correcting record: transcript of Judge Choate's remarks

7/23 Stipulation extension of time

8/18 Statement of points

8/25 Stipulation — designation additional record

8 Trustee petition for substantial consummation

9/20 Hearing

9/28 Order of consummation

11/9 Stipulation extension time file brief

11/15 SEC brief (64 pages)

11/17 Brief

12/16 Stipulation re supplemental record

12/29 Trustee brief

DISBURSEMENTS: total not less than $1,387.10

Mason:

long distance phone tolls and wires	$165.94
travel (N.Y. to W.P.B.: N.Y. to Wash.)	460.83
printing, mimeo and bulk postage	60.00
	686.77

Langbein:

long distance phone tolls and wires	131.42
travel	94.35
printing, mimeo and bulk postage	347.36
miscellaneous	127.20
	$700.33

TIME: total not less than hrs. 935-¾

Mason, M.: not less than 410 hours on 133 days

Mason, I.: not less than 278 hours on 45 days

Langbein: not less than 247-¾ hours on 100 days

1966

The major litigation activities of 1960 reply briefing and oral argument at Jacksonville on Plan III in the Court of Appeals and postargument briefing; investigation of the opposition to the newly disclosed $115,000 Pauline Golding (Mrs. Shaffer) debenture claim; initiation of certiorari to U.S. Supreme Court.

Committee pleadings, participation in hearings	Documents by other parties requiring extended consideration (i.e., excluding documents served and cursorily reviewed)

1/8 U.S. Brief

1/19 Trustee petition for substantial consummation

SEC objection to order under §229

2/ Order in aid of consummation

2/17 SEC reply brief

2/26 Reply brief

3/16 Oral argument at Jacksonville

3/24 Chronology

" Objection to Pauline Golding claim

3/25 Hearing

3/20 Trustee petition to authorize stock to debenture holders, including Pauline Golding

4/10 Trustee supplementary brief

4/19 Reply memorandum

4/20 Petition for disallowance of Pauline Golding claim

4/30 Motion re objections to P. Golding claim and petition for disallowance of same

5/9 Hearing

5/9 Trustee petition to dismiss motion to disallow P. Golding claim

5/9 Response of Pauline Golding

7/25 Objection to petition re towing contract

7/25 Trustee petition for renewal of towing contract

11/4	Application extension time to file petition for certiorari	10/	Trustee petition for order of substantial consummation and concluding trusteeship
11/10	Hearing	11/14	SEC objection

DISBURSEMENTS: total not less than $1,375.53

Mason:	
long distance phone tolls and wires	$212.58
travel (N.Y. to Jacksonville, W.P.B., Wash, and N.Y.)	616.25
miscellaneous	15.00
	843.83
Langbein:	
long distance phone tolls and wires	190.45
travel	161.26
printing, mimeo and bulk postage	124.78
miscellaneous	55.21
	$531.70

TIME: total not less than hrs. 793-¼

Mason, M.: not less than 315-½ hours on 141 days

Mason, I.: not less than 252 hours on 45 days

Langbein: not less than 225-¾ hours on 108 days

1967

Major litigation activities of 1697: certiorari proceedings in the Supreme Court — petition (34 pages) and reply brief; brief on the merits (72 pages) and reply brief, and oral argument at Washington. Briefs of trustee, S-S and SEC ran 34-72 pages each.

Committee pleadings		Documents by other parties requiring extended consideration	
1/9	Petition for writ of certiorari	1/26	Trustee brief in opposition
2/8	Reply brief	3/25	SEC memorandum in support of certiorari
		5/16	Trustee reply to SEC memo
6/6	Motion dispense with printing record		
8/21	Application for exsion time to file brief		
9/8	Brief	9/	SEC brief
		10/19	Trustee's brief
		10/20	S-S brief
11/6	Reply brief	11/	SEC reply brief
11/7, 8	Oral argument		

DISBURSEMENTS: total not less than $3,270.00

Mason:

long distance phone tolls and wires	$107.03
travel (W.P.B. to Wash.)	84.42
printing, mimeo and bulk postage	903.07
miscellaneous	128.30
	1,222.82

Langbein:	
long distance phone tolls and wires	321.82
travel	1,021.89
printing, mimeo and bulk postage	563.71
miscellaneous	139.76
	$2,047.18

TIME: total not less than hrs. 1,226-½

Mason, M.: not less than 268 hours on 86 days

Mason, I: not less than 418-½ hours on 120 days

Langbein: not less than 540 hours on 124 days

1968

Major litigation activities of 1968 to date through June 30, 1968: proceedings in Court of Appeals on remand, seeking removal of trustee and judge and detailed instructions on mandate.

Committee pleadings	Documents by other parties requiring extended consideration
5/ Application to Court of Appeals (telegram) for extension time to June 4 to answer trustee	5/14 SEC suggestions to Court of Appeals
	5/17 Trustee response
	5/23 " notice of hearing on June 7
Motion postpone hearing	5/28 Trustee reply to committee wire
	" SEC reply to trustee
	5/29 SEC motion to postpone hearing

6/3	Petition for guidance manddate	6/4	Trustee objections to delay
		"	District Court order postponing hearing on mandate
6/6	Telegram protesting fees	6/25	Order of Circuit Court of Appeals

DISBURSEMENTS: total not less than $1,289.23
adjustments 1,051.90*
$2,341.13

*Principally consisting of unentered 1965 mimeographing of appeal record of Plan III ($602.00) and 33 unentered trips West Palm Beach to Miami by personally owned auto ($539.55).

Mason:

long distance phone tolls and wires	$63.97
printing, mimeo and bulk postage	11.53
miscellaneous	183.66
	259.16

Langbein:

long distance phone tolls and wires	368.10
printing, mimeo and bulk postage	49.13
travel	384.89
miscellaneous	227.95
	$1,030.07

TIME: total not less than hrs. 364-¾

Mason, M.: not less than 84 hours on 31 days

Mason, I.: not less than 173 hours on 53 days

Langbein: not less than 107-¾ hours on 44 days

Total disbursements 1957 to Aug. 30, 1968
(does not include $500 appeal cost bonds outstanding, believed recoverable on demand)
not less than $18,496.44

Total time 1957 to June 30, 1968
not less than hrs. 8,133-¾

IRMA S. MASON
1001 Connecticut Avenue, N.W.
Washington, D. C. 00036

IRWIN L. LANGBEIN
310 Citizens Building
West Palm Beach, Florida 33401

Attorneys for Protective
Committee for Independent
Stockholders of TMT Trailer
Ferry, Inc.

By /s/ Irwin L. Langbein
Of Counsel

STATE OF FLORIDA)
COUNTY OF PALM BEACH)

IRMA S. MASON, MALCOLM S. MASON, and IRWIN L. LANGBEIN, being duly sworn by the undersigned officer, on their oaths say:

We have jointly prepared the above Statement of Time and Disbursements. With respect to recitals of in-

dividual activities of eaxh of us the person whose activities are recited says it is true; and with respect to the activities of other persons each of us is informed and believes it to be true.

/s/ Irma S. Mason
IRMA S. MASON

/s/ Malcolm S. Mason
MALCOLM S. MASON

/s/ Irwin L. Langbein
IRWIN L. LANGBEIN

Sworn to and subscribed before me this September 2, 1968

/s/ M. Daphene Hatcher (N.P.)
Notary Public, State of Florida

My Commission expires: 12/13/68

IN THE UNITED STATES DISTRICT COURT IN AND FOR THE SOUTHERN DISTRICT OF FLORIDA MIAMI DIVISION

MOTION FOR ORDER REQUIRING ATTORNEYS FOR STOCKHOLDERS COMMITTEE TO COMPLY WITH SECTION 210 OF THE BANKRUPTCY ACT

Filed December 24, 1968

[TITLE OMITTED]

The undersigned creditors respectfully move this Honorable Court for the entry of an order requiring the attorneys for the Stockholders' Committee to comply with the provisions of Section 210 of the Bankruptcy Act ((11 U.S.C. Sec. 610) by filing a statement setting forth:

1. The names and addresses of the stockholders presently represented by said attorneys.

2. The amount of stock held by each stockholder.

3. The time of acquisition of such stock by each stockholder (except as to stock acquired more than one year prior to the filing of the petition for re-organization).

Memorandum of law is attached.

MILLER ELECTRIC COMPANY OF FLORIDA

ST. JOHNS PILOT ASSOCIATION

WHITE STACK TOWING CORPORATION

WAYLAND T. COPPEDGE AND SON CORPORATION

FLORIDA TOWING CORPORATION

By s/ Lewis S. Lee

(Lewis S. Lee)

s/ Herman Ulmer

(Herman Ulmer)

ULMER, MURCHISON, ASHBY & BALL

850 Florida National Bank Building
Post Office Box 479
Jacksonville, Florida 32201
Attorneys for said Creditors

IN THE UNITED STATES DISTRICT COURT IN AND FOR THE SOUTHERN DISTRICT OF FLORIDA MIAMI DIVISION

SUPPLEMENT TO STATEMENT OF ATTORNEYS FOR PROTECTIVE COMMITTEE — PURSUANT TO §210

(Filed February 7, 1969)

[TITLE OMITTED]

Pursuant to direction of the Court at the hearing on December 27, 1968, counsel for the Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc., submit this supplement to the statement of attorneys heretofore filed pursuant to §210.

1. August 1957, the Protective Committee filed a statement pursuant to §211 and an application to be recognized as a party entitled to notice, naming as its attorneys Malcolm S. Mason and Irwin L. Langbein. Accompanying this statement was a list of stockholders who had specifically authorized the committee to represent them, together with a copy of the form of authorization. Also accompanying this statement was a statement pursuant to §210 filed by the attorneys.

2. September 16, 1957, after a hearing on notice to parties then of record, the committee was authorized by an order of Judge Whitehurst to represent stockholders and the attorneys were named as persons to receive notice on its behalf, the order reciting that all statutory requirements had been complied with.

3. No other committee representing stockholders has appeared in this case and so far as we are aware no individual stockholder has appeared in this case with the exception of management, creditors holding stock, and a family group who are both stockholders and creditors and consider their interests primarily those of a creditor (III, 373-5) and with the further exception of Malcolm S. Mason and his wife Irma S. Mason who are beneficial owners of stock in the corporation and are affiliated with the committee.

4. The committee considered that, by virtue of Judge Whitehurst's order of September 16, 1957, and as a matter of law, it represented the entire class of independent stockholders, that is those who were not affiliated with management and whose interests were not primarily those of the major creditors, and the committee has at all times conducted itself on that basis. The committee has taken occasion to make this plain on several occasions including its Comment on Investigation Report of the Trustee, II, 858-60.

5. The committee made no further efforts to obtain formal authorizations from stockholders but has from time to time received formal authorizations covering an estimated additional 60,000 shares and has answered informal phone inquiries, letters and personal visits from stockholders and has added the names of such inquirers to its mailing list.

6. In January - June 1960, the trustee conducted an inquiry in the course of which a major topic of investigation (I, 255-6) was the identity of the committee, its

counsel and the stockholders it represented (I, 256, 242-3). Malcolm S. Mason, one of the committee's attorneys, appeared at the request of the trustee as a witness at that investigation, answered all questions put to him by the trustee and by representatives of the SEC and of the major creditors present at the hearing, and supplied at the request of the trustee's counsel for examination and copying all original authorizations filed with the committee and the complete mailing list of the committee together with copies of general mailings by the committee to stockholders on its mailing list.

7. Irwin L. Langbein continues to act as attorney for the committee. Malcolm S. Mason continued to act as such attorney until approximately September 14, 1966. After that date he has no longer appeared as attorney for the committee but has acted as advisor to the committee and its counsel and has appeared in his own behalf as a stockholder. Irma S. Mason has acted as counsel to the committee's attorneys from approximately January 1, 1960, originally in association with her husband Malcolm S. Mason and after September 14, 1966, in association with Mr. Langbein. She has also appeared in her own behalf as an individual stockholder and on behalf of all stockholders similarly situated.

8. The committee membership has not changed. The committee has not been notified by any stockholder who has furnished a specific authorization that that stockholder no longer desires the committee to represent his interests.

9. On May 14, 1965, the District Court directed the discharge of the committee forthwith (III, 350-1; 387-9)

and barred it from taking any appeal not already perfected from any order of the District Court including the order discharging it (III, 372-2; 389). On June 7, 1965, the order was modified to permit the taking of an appeal. On June 21, 1965, the committee appealed. On March 1968, the U.S. Supreme Court reversed and remanded, expressly directing that the discharge of the committee could not stand. On August 9, 1968, this Court expressly restored the committee.

10. During the interval when the committee's status was in doubt, committee counsel with the approval of the committee acted on behalf of individual stockholder Irma S. Mason in the interests however of the entire class.

11. From the inception of the Protective Committee until September 14, 1966, Malcolm S. Mason has been secretary and counsel and sole custodian of its records. After September 14, 1966, Irma S. Mason has been custodian of the committee records. This affidavit is prepared by Irma S. Mason on information and belief, based primarily on the records of the committee, as to which she has personal knowledge, confirmed by inquiry made of Irwin L. Langbein, of Malcolm S. Mason and of each of the committee members.

Respectfully submitted,

ss/ _____
IRWIN L. LANGBEIN

ss/ _____
IRMA S. MASON

ss/ _____
MALCOLM S. MASON

The foregoing Supplement to Statement of Attorneys for Protective Committee — Pursuant to §210, executed by Irwin L. Langbein and Irma S. Mason, of counsel to the Committee, and Malcolm S. Mason, individually and as described above,

Sworn to before me by Irwin L. Langbein this January 28, 1969

s/ Lillian L. Fine (NPS)
Notary Public,
Expires: 10/6/72

Sworn to before me by Irma S. Mason this January 28, 1969

s/ Lillian L. Fine (NPS)
Notary Public

State of Florida at Large
Sworn to before me by Malcolm S. Mason this January 29, 1969

s/ Henry Schoenfeld (NPS)
Notary Public, District of Columbia Commission expires: Aug. 31, 1972

I CERTIFY that copy of the above "Supplement to Statement of Attorneys for Protective Committee — Pursuant to §210" was mailed to all addresses named in the attached list, this 6th day of February, 1969.

ss/ _____
IRWIN L. LANGBEIN

APPENDIX
of
STATUTES
GENERAL ORDERS IN BANKRUPTCY
APPELLATE RULES OF PROCEDURE
CIVIL RULES OF PROCEDURE

Act of July 1, 1898, c. 541, § 24, 30 Stat. 553; as amended, June 22, 1938, c. 575, § 1, 52 Stat. 854; as amended July 7, 1952, c. 579, § 9, 66 Stat. 423 [referred to as § 24 of the Bankruptcy Act — 11 U.S.C. § 47] provides:

> "24. Jurisdiction of Appellate Courts. a. The United States court of appeals, in vacation, in chambers, and during their respective terms, as now or as they may be hereafter held, are hereby invested with appellate jurisdiction from the several courts of bankruptcy in their respective jurisdictions in proceedings in bankruptcy, either interlocutory or final, and in controversies arising in proceedings in bankruptcy, to review, affirm, revise, or reverse, both in matters of law and in matters of fact: Provided, however, That the jurisdiction upon appeal from a judgment on a verdict rendered by a jury shall extend to matters of law only: And provided further, That when any order, decree, or judgment involves less than $500, an appeal therefrom may be taken only upon allowance of the appellate court.

b. Such appellate jurisdiction shall be exercised by appeal and in the form and manner of an appeal.

c. The Supreme Court of the United States is hereby vested with jurisdiction to review judgments, decrees, and order of the United States court of appeals in proceedings under this Act in accordance with the provisions of the laws of the United States now in force or such as may hereafter be enacted."

Act of July 1, 1898, c. 541, § 57, 30 Stat. 560; as amended, June 23, 1938, c. 575, § 1, 52 Stat. 866; as amended, June 12, 1960, Pub.L. 86-519, § 1, 74 Stat. 217 [referred to as § 57a, Bankruptcy Act — 11 U.S.C. § 93a], provides:

"Proof and Allowance of Claims. a. A proof of claim shall consist of a statement, in writing and signed by a creditor, setting forth the claim; the consideration therefor; whether any and, if so, what securities are held therefor; and whether any and, of so, what payments have been made thereon; and that the claim is justly owing from the bankrupt to the creditor. A proof of claim filed in accordance with the requirements of the Bankruptcy Act, the General Orders of the Supreme Court, and the official forms, even though not verified under oath, shall constitute prima facie evidence of the validity and amount of the claim."

Act of July 1, 1898, c. 541, § 57, 30 Stat. 560; as amended June 22, 1938, c. 575, § 1, 52 Stat. 866 [referred to as § 57k, Bankruptcy Act — 11 U.S.C. § 93k], provides:

"Claims which have been allowed may be reconsidered for cause and reallowed or rejected in whole or in part according to the equities of the case, before but not after the estate has been closed."

Act of July 1, 1898, c. 541, § 167, as added June 22, 1938, c. 575, § 1, 52 Stat. 890 [referred to as § 167, Bankruptcy Act — 11 U.S.C. § 567], provides:

"The trustee upon his appointment and qualification—

(1) shall, if the judge shall so direct, forthwith investigate the acts, conduct, oroperty, liabilities, and financial condition of the debtor, the operation of its business and the desireability of the continuance thereof, and any other matter relevant to the proceeding or to the formulation of a plan, and report thereon to the judge;

(2) may, if the judge shall so direct, examine the directors and officers of the debtor and any other witnesses concerning the foregoing matters or any of them;

(3) shall report to the judge any facts ascertained by him pertaining to fraud, misconduct, mismanagement and irregularities, and to any causes of action available to the estate;

(4) may, subject to the approval of the judge, employ such person or persons as the judge may deem necessary for the purpose of assisting the trustee in performing the duties imposed upon him under this chapter;

(5) shall, at the earliest date practicable, prepare and submit a brief statement of his investigation of the property, liabilities, and financial condition of the debtor, the operation of its business and the desirability of the continuance thereof, in such form and manner as the judge may direct, to the creditors, stockholders, indenture trustees, the Securities and Exchange Commission and such other persons as the judge may designate; and

(6) shall give notice to the creditors and stockholders that they may submit to him suggestions for the formulation of a plan, or proposals in the form of plans, within a time therein named."

Act of July 1, 1898, c. 541, § 170, as added June 22, 1938, c. 575, § 1, 52 Stat. 890 [referred to as § 170, Bankruptcy Act — 11 U.S.C. § 570], provides:

"After the hearing, as provided in section 169 or section 170 of this Act, and, if a plan has been submitted to the Securities and Exchange Commission, as provided in section 172 of this Act, then after the filing of the report or notice that it will not be filed, or after the expiration of the time for its filing, whichever first occurs, the judge shall enter an order approving the plan or plans which in his opinion comply with the provisions of section 216 of this Act, and which are fair and equitable, and feasible, and shall fix a time within which the creditors and stockholders affected thereby may accept the same."

Act of July 1, 1898, c. 541, § 175, as added June 22, 1938, c. 575, § 1, 52 Stat. 891 [referred to as § 175, Bankruptcy Act — 11 U.S.C. § 575], provides:

> "Upon the approval of a plan by the judge, the trustee or the debtor in possession shall transmit, by mail or otherwise, to all creditors and stockholders who are affected by any such plan—
>
> (1) the plan or plans so approved, together with a summary thereof approved by the judge;
>
> (2) the opinion of the judge, if any, approving the plan, or plans, or a summary thereof approved by the judge;
>
> (3) the report, if any, filed in the proceeding by the Securities and Exchange Commission, as provided in section 172 of this Act, or a summary thereof prepared by the Securities and Exchange Commission; and
>
> (4) such other matters as the judge may deem necessary or desirable for the information of creditors and stockholders."

Act of July 1, 1898, c. 541, § 179, as added June 22, 1938, c. 575, § 1, 52 Stat. 892 [referred to as § 179, Bankruptcy Act — 11 U.S.C. § 579], provides:

> "After a plan has been accepted in writing, filed in court, by or on behalf of creditors holding two-thirds in amount of the claims filed and allowed each class, and, if the debtor has not been found to be insolvent, by or on behalf of stock-

holders holding the majority of stock, of which proofs have been filed and allowed, of each class, exclusive of creditors or stockholders or of any class of them who are not affected by the plan or whose claims or stock are disqualified pursuant to section 203 of this Act, or for whom payment or protection has been provided as prescribed in paragraphs (7) and (8) of section 216 of this Act, the judge shall fix a hearing, upon notice to the debtor, creditors, stockholders, indenture trustees, the Secretary of the Treasury, the Securities and Exchange Commission, and such other persons as the judge may designate, for the consideration of the confirmation of the plan and of such objections as may be made to the confirmation."

Act of July 1, 1898, c. 541, § 180, as added June 22, 1938, c. 575, § 1, 52 Stat. 892 [referred to as § 180, Bankruptcy Act — 11 U.S.C. § 580], provides:

"The order of the judge approving a plan, as provided in section 174 of this Act, shall not affect the right of the debtor, a creditor, indenture trustee, or stockholder to object to the confirmation of the plan."

Act of July 1, 1898, c. 541, § 196, as added June 22, 1938, c. 575, § 1, 52 Stat. 893 [referred to as § 196, Bankruptcy Act — 11 U.S.C. § 596], provides:

"After the approval of the petition the judge shall prescribe the manner in which and fix a time within which the proofs of claim of creditors

and of the interests of stockholders may be filed and allowed. Objections by any party in interest to the allowance of any such claims or interests shall be heard and summarily determined by the court."

Act of July 1, 1898, c. 541, § 203, as added June 22, 1938, c. 575, § 1, 52 Stat. 894 [referred to as § 203, Bankruptcy Act — 11 U.S.C. § 603], provides:

"If the acceptance or failure to accept a plan by the holder of any claim or stock is not in good faith, in the light of or irrespective of the time of acquisition thereof, the judge may, after hearing upon notice, direct that such claim or stock be disqualified for the purpose of determining the requisite majority for the acceptance of a plan."

Act of July 1, 1898, c. 541, § 206, as added June 22, 1938, c. 575, § 1, 52 Stat. 894 [referred to as § 206, Bankruptcy Act — 11 U.S.C. § 606], provides:

"The debtor, the indenture trustees, and any creditor or stockholder of the debtor shall have the right to be heard on all matters arising in a proceeding under this chapter. The judge may, for cause shown, permit a labor union or employees' association, representative of employees of the debtor, to be heard on the economic soundness of the plan affecting the interests of the employees."

Act of July 1, 1898, c. 541, § 207, as added June 22, 1938, c. 575, § 1, 52 Stat. 894 [referred to as § 207, Bankruptcy Act — 11 U.S.C. § 607], provides:

The judge may for cause shown permit a party in interest to intervene generally or with respect to any specified matter. Except where otherwise provided in this chapter, the judge may from time to time enter orders designating the matters in respect to which, the persons to whom, and the form and manner in which notice shall be given.

Act of July 1, 1898, c. 541, § 208, as added June 22, 1938, c. 575, § 1, 52 Stat. 894 [referred to as § 208, Bankruptcy Act — 11 U.S.C. § 608], provides:

> "The Securities and Exchange Commission shall, if requested by the judge, and may, upon its own motion if approved by the judge, file a notice of its appearance in a proceeding under this chapter. Upon the filing of such a notice, the Commission shall be deemed to be a party in interest, with the right to be heard on all matters arising in such proceeding, and shall be deemed to have intervened in respect of all matters in such proceeding with the same force and effect as if a petition for that purpose had been allowed by the judge; but the Commission may not appeal or file any petition for appeal in any such proceeding."

Act of July 1, 1898, c. 541, § 209, as added June 22, 1938, c. 575, § 1, 52 Stat. 895 [referred to as § 209, Bankruptcy Act — 11 U.S.C. § 609], provides:

> "Any creditor or stockholder may in a proceeding under this chapter act in person, by an attor-

ney at law, or by duly authorized agent or committee."

Act of July 1, 1898, c. 541, § 210, as added June 22, 1938, c. 575, § 1, 52 Stat. 895 [referred to as § 210, Bankruptcy Act — 11 U.S.C. § 610], provides:

"An attorney for creditors or stockholders shall not be heard unless he has first filed with the court a statement setting forth the names and addresses of such creditors or stockholders, the nature and amounts of their claims or stock, and the time of acquisition thereof, except as to claims or stock alleged to have been acquired more than one year prior to the filing of the petition."

Act of July 1, 1898, c. 541, § 211, as added June 22, 1938, c. 575, § 1, 52 Stat. 895 [referred to as § 211, Bankruptcy Act — 11 U.S.C. § 611], provides:

"Every person or committee, representing more than twelve creditors or stockholders, and every indenture trustee, who appears in the proceeding shall file with the court a statement, under oath, which shall include—

(1) a copy of the instrument, if any, whereby such person, committee, or indenture trustee is empowered to act on behalf of creditors or stockholders;

(2) a recital of the pertinent facts and circumstances in connection with the employment of such person or indenture trustee, and, in the case of a committee, the name or names of the person

or persons at whose instance, directly or indirectly, such employment was arranged or the committee was organized or formed or agreed to act;

(3) with reference to the time of the employment of such person, or the organization or formation of such committee, or the appearance in the proceeding of any indenture trustee, a showing of the amounts of claims or stock owned by such person, the members of such committee or such indenture trustee, the times when acquired, the amounts paid therefor, and any sales or other disposition thereof; and

(4) a showing of the claims or stock represented by such person or committee and the respective amounts thereof, with an averment that each holder of such claims or stock acquired them at least one year before the filing of the petition or with a showing of the times of acquisition thereof."

Act of July 1, 1898, c. 541, § 224, as added June 22, 1938, c. 575, § 1, 52 Stat. 898 [referred to as § 224, Bankruptcy Act — 11 U.S.C. § 624], provides:

"Upon confirmation of a plan —

(1) the plan and its provisions shall be binding upon the debtor, upon every other corporation issuing securities or acquiring property under the plan, and upon all creditors and stockholders, whether or not such creditors and stockholders are affected by the plan or have accepted it or have filed proofs of their claims or interests

and whether or not their claims or interests have been scheduled or allowed or are allowable;"

Act of July 1, 1898, c. 541, § 241, as added June 22, 1938, c. 575, § 1, 52 Stat. 900 [referred to as § 241, Bankruptcy Act — 11 U.S.C. § 641], provides:

"The judge may allow reimbursement for proper costs and expenses incurred by the petitioning creditors and reasonable compensation for services rendered and reimbursement for proper costs and expenses incurred in a proceeding under this chapter—

(1) by a referee;

(2) by a special master;

(3) by the trustee and other officers, and the attorneys for any of them;

(4) by the attorney for the debtor; and

(5) by the attorney for the petitioning creditors.

Such compensation of referees and trustees shall not be governed by sections 40 and 48 of this Act."

Act of July 1, 1898, c. 541, § 242, as added June 22, 1938, c. 575, § 1, 52 Stat. 900 [referred to as § 242, Bankruptcy Act — 11 U.S.C. § 642], provides:

"The judge may allow reasonable compensation for services rendered and reimbursement for proper costs and expenses incurred in connection

with the administration of an estate in a proceeding under this chapter or in connection with a plan approved by the judge, whether or not accepted by creditors and stockholders or finally confirmed by the judge —

(1) by indenture, trustees, depositaries, reorganization managers, and committees or representatives of creditors or stockholders;

(2) by any other parties in interest except the Securities and Exchange Commission; and

(3) by the attorneys or agents for any of the foregoing except the Securities and Exchange Commission."

Act of July 1, 1898, c. 541, § 243, as added June 22, 1938, c. 575, § 1, 52 Stat. 900 [referred to as § 243, Bankruptcy Act — 11 U.S.C. § 643], provides:

"The judge may allow reasonable compensation for services rendered and reimbursement for proper costs and expenses incurred by creditors and stockholders, and the attorneys for any of them, in connection with the submission by them of suggestion for a plan or of proposals in the form of plans, or in connection with objections by them to the confirmation of a plan, or in connection with the administration of the estate. In fixing any such allowances, the judge shall give consideration only to the services which contributed to the plan confirmed or to the refusal of confirmation of a plan, or which were beneficial in the administration of the estate, and to the proper costs and expenses incidental thereto."

Act of July 1, 1898, c. 541, § 250, as added June 22, 1938, c. 575, § 1, 52 Stat. 901; and amended June 25, 1948, c. 646, § 32(a), 62 Stat. 991; and May 24, 1949, c. 139, § 127, 63 Stat. 107 [referred to as § 250, Bankruptcy Act — 11 U.S.C. § 650], provides:

> "Appeals may be taken in matters of law or fact from orders making or refusing to make allowances of compensation or reimbursement, and may, in the manner and within the time provided for appeals by this Act, be taken to and allowed by the court of appeals independently of other appeals in the proceeding, and shall be summarily heard upon the original papers"

Act of June 25, 1948, c. 646, 62 Stat. 963; as amended May 24, 1949, c. 139, §§ 107, 108, 63 Stat. 104 [28 U.S.C. § 2107], provides:

> "Except as otherwise provided in this section, no appeal shall bring any judgment, order or decree in an action, suit or proceeding of a civil nature before a court of appeals for review unless notice of appeal is filed, within thirty days after the entry of such judgment, order or decree.
>
> In any such action, suit or proceeding in which the United States or an officer or agency thereof is a party, the time as to all parties shall be sixty days from such entry.
>
> In any action, suit or proceeding in admiralty, the notice of appeal shall be filed within ninety days after the entry of the order, judgment or

decree appealed from, if it is a final decision, and within fifteen days after its entry if it is an interlocutory decree.

The district court may extend the time for appeal not exceeding thirty days from the expiration of the original time herein prescribed, upon a showing of excusable neglect based on failure of a party to learn of the entry of the judgment, order or decree.

This section shall not apply to bankruptcy matters or other proceedings under Title 11."

Act of August 26, 1935, c. 687, Title I, § 11, 49 Stat. 820, §§ 11(e), (f) [15 U.S.C. § 79k(e), (f)], provides:

"(e) In accordance with such rules and regulations or order as the Commission may deem necessary or appropriate in the public interest or for the protection of investors or consumers, any registered holding company or any subsidiary company of a registered holding company may, at any time after January 1, 1936, submit a plan to the Commission for the divestment of control, securities, or other assets, or for other action by such company or any subsidiary company thereof for the purpose of enabling such company or any subsidiary company thereof to comply with the provisions of subsection (b) of this section. If, after notice and opportunity for hearing, the Commission shall find such plan, as submitted or as modified, necessary to effectuate the provisions of subsection (b) of this section and fair

and equitable to the persons affected by such plan, the Commission shall make an order approving such plan; and the Commission, at the request of the company, may apply to a court, in accordance with the provisions of subsection (f) of section 79r of this title, to enforce and carry out the terms and provisions of such plan. If, upon any such application, the court, after notice and opportunity for hearing, shall approve such plan as fair and equitable and as appropriate to effectuate the provisions of this section, the court as a court of equity may, to such extent as it deems necessary for the purpose of carrying out the terms and provisions of such plan, take exclusive jurisdiction and possession of the company or companies and the assets thereof, wherever located; and the court shall have jurisdiction to appoint a trustee, and the court may constitute and appoint the Commission as sole trustee, to hold or administer, under the direction of the court and in accordance with the plan theretofore approved by the court and the Commission, the assets so possessed.

(f) In any proceeding in a court of the United States, whether under this section or otherwise, in which a receiver or trustee is appointed for any registered holding company, or any subsidiary company thereof, the court may constitute and appoint the Commission as sole trustee or receiver, subject to the direction and orders of the court, whether or not a trustee or receiver shall theretofore have been appointed, and in any such proceeding the court shall not appoint any person other than the Commission

as trustee or receiver without notifying the Commission and giving it an opportunity to be heard before making any such appointment. In no proceeding under this section or otherwise shall the Commission be appointed as trustee or receiver without its express consent. In any such proceeding a reorganization plan for a registered holding company or any subsidiary company thereof shall not become effective unless such plan shall have been approved by the Commission after opportunity for hearing prior to its submission to the court. Notwithstanding any other provision of law, any such reorganization plan may be proposed in the first instance by the Commission or, subject to such rules and regulations as the Commission may deem necessary or appropriate in the public interest or for the protection of investors, by any person having a bona fide interest (as defined by the rules and regulations of the Commission) in the reorganization. The Commission may, by such rules and regulations or order as it may deem necessary or appropriate in the public interest or for the protection of investors or consumers, require that any or all fees, expenses, and remuneration, to whomsoever paid, in connection with any reorganization, dissolution, liquidation, bankruptcy, or receivership of a registered holding company or subsidiary company thereof, in any such proceeding, shall be subject to approval by the Commission."

General Order 44 [General Orders in Bankruptcy adopted by the Supreme Court of the United States] added April

13, 1925, as amended April 17, 1933; June 1, 1936; January 16, 1939] 28 U.S.C. Rules.

44.—Appointment of Attorneys—

"No attorney for a receiver, trustee or debtor in possession shall be appointed except upon the order of the court, which shall be granted only upon the verified petition of the receiver, trustee or debtor in possession, stating the name of the counsel whom he wishes to employ, the reasons for his selection, the professional services he is to render, the necessity for employing counsel at all, and to the best of the petitioner's knowledge all of the attorney's connections with the bankrupt or debtor, the creditors or any other party in interest, and their respective attorneys. If satisfied that the attorney represents no interest adverse to the receiver, the trustee, or the estate in the matters upon which he is to be engaged, and that his employment would be to the best interests of the estate, the court may authorize his employment, and such employment shall be for specific purposes unless the court is satisfied that the case is one justifying a general retainer. If without disclosure any attorney acting for a receiver or trustee or debtor in possession shall have represented any interest adverse to the receiver, trustee, he is employed for such receiver, trustee, or debtor in possession, the court may deny the allowance of any fee to such attorney, or the reimbursement of his expenses, or both, and may

also deny any allowance to the receiver or trustee if it shall appear that he failed to take diligent inquiry into the connections of said attorney.

Nothing herein contained shall prevent the judge, in proceedings under section 77 of the Act, from authorizing the employment of attorneys who are attorneys of the corporation, or associated with its legal departments, in connection with the operation of the business of the corporation by a trustee or trustees under subsection (c) of section 77, when such employment is found by the judge to be in the public interest in relation to such operation and is not adverse to the interests of the trustee or trustees or of the creditors of the corporation."

Title 28 U.S.C., Rules, United States Court of Appeals Rules, Rule 4, provides:

Rule 4. Appeal as of Right—When Taken

(a) Appeals in Civil Cases. In a civil case (including a civil action which involves an admiralty or maritime claim and a proceeding in bankruptcy or a controversy arising therein) in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 shall be filed with the clerk of the district court within 30 days of the date of the entry of the judgment or order appealed from; but if the United States or an officer or agency thereof is a party, the notice of appeal may be filed by any party within 60 days of such entry. If a timely notice of appeal is filed

by a party, any other party may file a notice of appeal within 14 days of the date on which the first notice of appeal was filed, or within the time otherwise prescribed by this subdivision, whichever period lasts expires.

The running of the time for filing a notice of appeal is terminated as to all parties by a timely motion filed in the district court by any party pursuant to the Federal Rules of Civil Procedure hereafter enumerated in this sentence, and the full time for appeal fixed by this subdivision commences to run and is to be computed from the entry of any of the following orders made upon a timely motion under such rules: (1) granting or denying a motion for judgment under Rule 50(b); (2) granting or denying a motion under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (3) granting or denying a motion under Rule 59 to alter or amend the judgment; (4) denying a motion for a new trial under Rule 59. A judgment or order is entered within the meaning of this subdivision when it is entered in the civil docket.

Upon a showing of excusable neglect, the district court may extend the time for filing the notice of appeal by any party for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this subdivision. Such an extension may be granted before or after the time otherwise prescribed by this subdivision has expired; but if a request for an extension is made

after such time has expired, it shall be made by motion with such notice as the court shall deem appropriate.

(b) Appeals in Criminal Cases. In a criminal case the notice of appeal by a defendant shall be filed in the district court within 10 days after the entry of the judgment or order appealed from. A notice of appeal filed after the announcement of a decision, sentence or order but before entry of the judgment or order shall be treated as filed after such entry and on the day thereof. If a timely motion in arrest of judgment or for a new trial on any ground other than newly discovered evidence has been made, an appeal from a judgment of conviction may be taken within 10 days after the entry of an order denying the motion. A motion for a new trial based on the ground of newly discovered evidence will similarly extend the time for appeal from a judgment of conviction if the motion is made before or within 10 days after entry of the judgment. When an appeal by the government is authorized by statute, the notice of appeal shall be filed in the district court within 30 days after the entry of the judgment or order appealed from. A judgment or order is entered within the meaning of this subdivision when it is entered in the criminal docket. Upon a showing of excusable neglect the district court may, before or after the time has expired, with or without motion and notice, extend the time for filing a notice of appeal for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this subdivision.

Title 28 U.S.C., Rules, United States Court of Appeals Rules, Rule 6, provides:

Rule 6. Appeals by Allowance in Bankruptcy Proceedings

(a) Petition for Allowance. Allowance of an appeal under section 24 of the Bankruptcy Act (11 U.S.C. § 47) from orders, decrees, or judgments of a district court involving less than $500, or from an order making or refusing to make allowances of compensation or reimbursement under sections 250 or 498 thereof (11 U.S.C. § 650, § 898) shall be sought by filing a petition for allowance with the clerk of the court of appeals within the time provided by Rule 4(a) for filing a notice of appeal, with proof of service on all parties to the action in the district court. A notice of appeal need not be filed.

(b) Content of Petition; Answer. The petition shall contain a statement of the facts necessary to an understanding of the questions to be presented by the appeal; a statement of those questions and of the relief sought; a statement of the reasons why in the opinion of the petitioner the appeal should be allowed; and a copy of the order, decree or judgment complained of and of any opinion or memorandum relating thereto. Within 7 days after service of the petition an adverse party may file an answer in opposition. The petition and answer shall be submitted without oral argument unless otherwise ordered.

(c) Form of Papers; Number of Copies. All papers may be typewritten. Three copies shall be filed with the original, but the court may require that additional copies be furnished.

(d) Allowance of the Appeal; Cost Bond; Filing of Record. If the appeal is allowed the appellant shall file a bond for costs as required by Rule 7, within 10 days of the entry of the order granting permission to appeal, and the record shall be transmitted and filed and the appeal docketed in accordance with Rules 11 and 12. The time fixed by those rules for transmitting the record and docketing the appeal shall run from the date of the entry of the order allowing the appeal. A notice of appeal need not be filed.

Title 28 U.S.C., Rules, United States Court of Appeals Rules, Rule 26, provides:

Rule 26. Computation and Extension of Time

(a) Computation of Time. In computing any period of time prescribed by these rules, by an order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period shall be included, unless it is a Saturday, Sunday or a legal holiday, in which event the period extends until the end of the next day which is not a Saturday, Sunday or a legal holiday. When the period of time prescribed or allowed is less than 7 days, intermediate Saturdays, Sundays and legal holidays shall be excluded in the computa-

tion. As used in this rule "legal holiday" includes New Year's Day, Washington's Birthday, Memorial Day, Independence Day, Labor day, Veterans Day, Thanksgiving Day, Christmas Day, and any other day appointed as a holiday by the President or the Congress of the United States. It shall also include a day appointed as a holiday by the state wherein the district court which rendered the judgment or order which is or may be appealed from is situated, or by the state wherein the principal office of the clerk of the court of appeals in which the appeal is pending is located.

(b) Enlargement of Time. The court for good cause shown may upon motion enlarge the time prescribed by these rules or by its order for doing any act, or may permit an act to be done after the expiration of such time; but the court may not enlarge the time for filing a notice of appeal, a petition for allowance, or a petition for permission to appeal. Nor may the court enlarge the time prescribed by law for filing a petition to enjoin, set aside, suspend, modify, enforce or otherwise review, or a notice of appeal from, an order of an administrative agency, board, commission or officer of the United States, except as specifically authorized by law.

(c) Additional Time After Service by Mail. Whenever a party is required or permitted to do an act within a prescribed period after service of a paper upon him and the paper is served by mail, 3 days shall be added to the prescribed period.

Title 28 U.S.C., Rules, Federal Rules of Civil Procedure, Rule 26, provides: [NOTE: In effect at the time the trial court refused the entry of a protective order.]

Rule 26. Depositions Pending Action.

(a) When Depositions May Be Taken. Any party may take the testimony of any person, including a party, by deposition upon oral examination or written interrogatories for the purpose of discovery or for use as evidence in the action or for both purposes. After commencement of the action the deposition may be taken without leave of court, except that leave, granted with or without notice, must be obtained if notice of the taking is served by the plaintiff within 20 days after commencement of the action. The attendance of witnesses may be compelled by the use of subpoena as provided in Rule 45. Depositions shall be taken only in accordance with these rules, except that in admiralty and maritime claims within the meaning of Rule 9(h) depositions may also be taken under and used in accordance with sections 863, 864, and 865 of the Revised Statutes (see note preceding 28 U.S.C. §1781). The deposition of a person confined in prison may be taken only by leave of court on such terms as the court prescribes.

(b) Scope of Examination. Unless otherwise ordered by the court as provided by Rule 30 (b) or (d), the deponent may be examined regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the

examining party or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of relevant facts. It is not ground for objection that the testimony will be inadmissible at the trial if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence.

(c) Examination and Cross-Examination. Examination and cross-examination of deponents may proceed as permitted at the trial under the provisions of Rule 43(b).

(d) Use of Depositions. At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the rules of evidence, may be used against any party who was present or represented at the taking of the deposition or who had due notice thereof, in accordance with any one of the following provisions:

(1) Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of deponent as a witness.

(2) The deposition of a party or of any one who at the time of taking the deposition was an officer, director, or managing agent of a public or private corporation, partnership, or association which is a party may be used by an adverse party for any purpose.

(3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds: 1, that the witness is dead; or 2, that the witness is at a greater distance than 100 miles from the place of trial or hearing, or is out of the United States, unless it appears that the absence of the witness was procured by the party offering the deposition; or 3, that the witness is unable to attend or testify because of age, sickness, infirmity, or imprisonment; or 4, that the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or 5, upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used.

(4) If only part of a deposition is offered in evidence by a party, an adverse party may require him to introduce all of it which is relevant to the part introduced, and any party may introduce any other parts.

Substitution of parties does not affect the right to use depositions previously taken; and, when an action in any court of the United States or of any state has been dismissed and another action involving the same subject matter is afterward brought between the same parties or their representatives or successors in interest, all depositions lawfully taken and duly filed in the former

action may be used in the latter as if originally taken therefor.

(e) Objections to Admissibility. Subject to the provisions of Rules 28(b) and 32(c), objection may be made at the trial or hearing to receiving in evidence any deposition or part thereof for any reason which would require the exclusion of the evidence if the witness were then present and testifying.

(f) Effect of Taking or Using Depositions. A party shall not be deemed to make a person his own witness for any purpose by taking his deposition. The introduction in evidence of the deposition or any part thereof for any purpose other than that of contradicting or impeaching the deponent makes the deponent the witness of the party introducing the deposition, but this shall not apply to the use by an adverse party of a deposition as described in paragraph (2) of subdivision (d) of this rule. At the trial or hearing any party may rebut any relevant evidence contained in a deposition whether introduced by him or by any other party.

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Supreme Court of the United States

October Term 1970

In the Matter of: TMT TRAILER FERRY, INC., ET AL.

THOMAS J. KIRKLAND, as Trustee for TMT TRAILER FERRY, INC., et al.,

Petitioner,

vs.

PROTECTIVE COMMITTEE FOR INDEPENDENT STOCKHOLDERS OF TMT TRAILER FERRY, INC.,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

IRVING MARK WOLFF, P.A.
916 Biscayne Building
Miami, Florida 33130
Attorney for Petitioner

MIAMI REVIEW — 371-4853 — 377-3721

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No. _____

Supreme Court of the United States

October Term 1970

In the Matter of: TMT TRAILER FERRY, INC., ET AL.

THOMAS J. KIRKLAND, as Trustee for TMT TRAILER FERRY, INC., et al.,

Petitioner,

vs.

PROTECTIVE COMMITTEE FOR INDEPENDENT STOCKHOLDERS OF TMT TRAILER FERRY, INC.,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

To the Honorable Warren E. Burger, Chief Justice of the Supreme Court of the United States, and the Associate Justices of the Supreme Court of the United States:

The Petitioner, THOMAS J. KIRKLAND[1], as Trustee in reorganization of TMT Trailer Ferry, Inc., respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, reversing an order entered in a Chapter X bankruptcy reorganization matter[2] by the United States District Court for the Southern District of Florida allowing

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[1]Subsequent to the remand of the instant cause the Chief Judge of the United States District Court for the Southern District of Florida reassigned the matter to the Honorable W. O. Mehrtens, District Judge. C. Gordon Anderson, Trustee, resigned his position which was accepted by the Court on January 10, 1969. Thomas J. Kirkland was appointed successor Trustee and qualified as such on January 13, 1969. His petition for appointment of new counsel was granted by the Court, and Irving M. Wolff [now Irving Mark Wolff, P.A.] was appointed as such. At all times material to these proceedings Judge Mehrtens presided, Mr. Kirkland was Trustee, and Mr. Wolff was attorney for the Trustee.

[2]For background attention is directed to the past history of the matter in this Court. See *Protective Committee for Independent Stockholders of TMT Trailer Ferry v. C. Gordon Anderson, Trustee*, 390 U.S. 414, 88 S.Ct. 1157, 20 L.Ed.2d 1; rehearing denied 391 U.S. 909, 88 S.Ct. 1649, 20 L.Ed.2d 425 (1968).

All of the issued involved in the instant petition are the aftermath of this 1968 opinion filed by this Honorable Court. The issues are new to the litigation, but there appears to be a germaneness because of this Court's observations:

> "Since the committee will, of course, be entitled to participate in the new hearing on valuation and insolvency, the order of the District Court discharging it is vacated. So doing, however, reflects no opinion on the merits of the argument presented in this Court by petitioner as to why it should not have been discharged." [*TMT Trailer Ferry, Inc. v. Anderson*, supra, at 453; 88 S.Ct. 1157, 20 L.Ed.2d 1.]

a partial interim award of fees and reimbursement of expenses to counsel for the Protective Committee of Independent Stockholders of TMT Trailer Ferry, Inc., and denying a motion for the entry of a protective order in discovery proceedings, and further denying the entry of an order for instructions.

In accordance with Rule 23.5, U.S.Sup.Ct.Rules, as amended 1970 [28 U.S.C., Rules, Rule 23.5], the instant petition will be addressed to two consolidated causes since they involve closely related questions.[3]

Opinions Below

United States Court of Appeals for the Fifth Circuit, opinion dated October 27, 1970 (A. 63) is reported at 434 F.2d 804; its denial of the Petition for Rehearing and Rehearing En Banc (A. 71) is reported at 434 F.2d 808.

Jurisdiction

The Opinion of the Court of Appeals for the Fifth Circuit was filed October 27, 1970 (A. 63). Subsequent to the denial of the Petition for Rehearing and Rehearing en Banc (A. 71), the judgment was filed and issued as the appellate court's mandate on December 29, 1970 (A. 72).

[3]The record in the United States Court of Appeals for the Fifth Circuit reflects the docketing of two separate and distinct appeals [No. 29089 a permissive appeal; No. 29560 classified as an appeal of right]. Both causes were consolidated for argument and disposition. See *In Re TMT Trailer Ferry, Inc., Debtor, Protective Committee v. Kirkland*, 434 F.2d 804, October 27, 1970, rehearing and rehearing en banc denied at 808.

On January 25, 1971 the United States Court of Appeals for the Fifth Circuit recalled its mandate and stayed the same to and including February 24, 1971. (A. 73).

This instant petition is timely filed. [62 Stat. 961; 63 Stat. 104; 28 U.S.C. § 2101c and f.]

The jurisdiction of this Court is invoked under § 24c of the Bankruptcy Act; 52 Stat. 854; 62 Stat. 928; 11 U.S.C. § 47c, and 28 U.S.C. § 1254.

QUESTIONS PRESENTED

I.

Whether under Chapter X of the Bankruptcy Act, which provides for an appeal as a matter of right, a United States Court of Appeals can obtain jurisdiction where the notice of appeal is filed out of time.

II.

Whether the appellate court below erroneously curtailed the jurisdiction of the District Court, sitting in a bankruptcy reorganization, so as to preclude the trial court from investigating past and present conduct of parties, seeking interim allowances and reimbursement of costs, thereby severely curtailing the trial court's administrative jurisdiction over the proceedings.

III.

Whether under Chapter X of the Bankruptcy Act, which requires economics of administration and forbids duplication of compensation for the same services rendered by different parties, can counsel for a stockholders committee be allowed an award of fees for duplicating services performed by attorneys for the trustee, the Securities and Exchange Commission, and the United States of America.

IV.

Whether under Chapter X of the Bankruptcy Act, which provides that the Securities and Exchange Commission perform an advisory role, must a reorganization court divest itself of its jurisdiction when it awards partial interim fees and reimbursement for costs to counsel for a stockholders committee, i.e., not to make any award other than that recommended by the Securities and Exchange Commission, even though the agency does not undertake a separate fact-finding investigation, but relies solely upon the record of the cause.

V.

Whether under Chapter X of the Bankruptcy Act, which provides for the allowance of fees to counsel for stockholders committees, must the filed petition contain sufficient detail; must the petitioner prove his claim as to amount sought and right to be paid, or whether said petitioner may proffer evidence without introducing the same by making himself available for cross-examination;

and whether a United States Court of Appeals may become a trier of fact and substitute its own findings for that of the trial court and make allowances by relying solely upon the recommendations of the Securities and Exchange Commission, and the applicant's proffer of evidence and availability for cross-examination.

VI.

Whether or not under Chapter X of the Bankruptcy Act an interlocutory order denying an application for protection in discovery proceedings, and further refusing additional instructions defining the role of a stockholders committee, is an order of such definite finality as to render it appealable.

VII.

Whether under Chapter X of the Bankruptcy Act, which provides for allowances of fees to counsel for stockholders committees, is the statutory requirement of benefit to the estate diluted when the court takes into consideration services not deemed compensable to such counsel under the Act.

VIII.

Whether under Chapter X of the Bankruptcy Act, which provides for an allowance of fees to counsel for a stockholders committee, and the trial court makes a *partial* interim allowance and reimbursement for costs, and further reserves jurisdiction over the parties and the subject matter to finally dispose of the same, is such an order

appealable by the recipient of the award; and if so, what is the basis for appeal, i.e., abuse of discretion, or finding of fact inconsistent with the record.

Statutes, General Orders, Federal Rules of Appellate Procedure and Federal Rules of Civil Procedure Involved

The pertinent portions of the Act of July 1, 1898, c. 541, § 224, 30 Stat. 553; as amended June 22, 1938, c. 575, § 1, et seq., 52 Stat. 854, et seq., subsequently amended, [11 U.S.C. §§47, 93a, 93k, 501 et seq.]; Act of June 25, 1948, c. 646, 62 Stat. 963; as amended May 24, 1949, c. 139, §§ 107, 108, 63 Stat. 104 [28 U.S.C. § 2107]; Act of August 26, 1935, c. 687, Title I, § 11, 49 Stat. 820, §§ 11(e), (f); General Order 44 [General Orders in Bankruptcy adopted by the Supreme Court of the United States] [28 U.S.C., Rules, G.O. 44]; Rules 4, 6 and 26, Federal Rules of Appellate Procedure [28 U.S.C., Rules]; Rule 26, Federal Rules of Civil Procedure [28 U.S.C., Rules], are set forth in Appendix hereto at pages A. 163 to A. 189.

Statement

Subsequent to this Honorable Court's decision in 1968[4] the entire matter was remanded to the United States District Court for the Southern District of Florida. The

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Note: When reference hereinafter is made to the Bankruptcy Act, designation will be made to the Section thereof, cross reference to United States Code, and Appendix citation. All other citations will also include reference to the Appendix.

[4]*Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 88 S.Ct. 1157, 20 L.Ed. 2d 1; rehearing denied 391 U.S. 909, 88 S.Ct. 1649, 20 L.Ed.2d 425 (1968).

cause was reassigned as previously noted, to the Honorable William O. Mehrtens, District Judge, by order entered by the Honorable Charles B. Fulton, Chief Judge, United States District Court for the Southern District of Florida, on July 8, 1968.

Proceedings In The Trial Court

Shortly after the return of the cause to the District Court and the reassignment of the matter to Judge Mehrtens, counsel for the Protective Committee for Independent Stockholders [hereinafter referred to as Committee], for and on behalf of said Committee and itself, petitioned the Reorganization Court for an interim award of fees of $100,000.00 and reimbursement of costs of $18,496.44.[5]

Hearing on said application was held on December 27, 1968. After certain creditors moved for the entry of an order requiring counsel for the Committee to file the required statements in compliance with § 210 of the Bankruptcy Act [11 U.S.C.A. § 610 (A. 171)], such a direction was made, and in compliance therewith counsel for the Committee filed the required supplemental statement on February 7, 1969.[6]

The supplement to the statement of attorneys for the Committee reflected not only a substitution of counsel, it

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[5]For the Court's convenience the petition in its entirety is set forth at A. 90 to A. 155, because the contents thereof have severe implications in the appellate proceedings.

[6]Irwin L. Langbein and Malcolm Mason had previously filed their statements under § 210 of the Act on August 5, 1957 (A. 83). At no time prior to February 7, 1969 did Irma Mason file the statement required by § 210 of the Act. However, the supplement to the statement filed February 7, 1969 included Mrs. Mason (A. 158).

also made reference to a change in the secretariat of the Committee.[7]

The supplement to the § 210 statement was filed subsequent to the conclusion of the hearing on the application for interim fees and reimbursements, and contained new matter never before the trial court or alluded to in the hearing on the application for allowances, nor referred to in the petitions seeking the allowances. Among other things the supplement made reference to proceedings instituted in the reorganization litigation by Mrs. Mason on her own behalf and on behalf of a class of stockholders,[8] in which she was represented by counsel for the Committee. The supplement alleged that such representation was with the knowledge and consent of the Committee (A. 161). The gist of Mrs. Mason's petition in the proceedings sought to have her stock claim[9] reclassified as a general unsecured claim.

On January 14, 1969, prior to the filing by counsel for the Committee of its supplemental § 210 statement, the

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[7]During these proceedings Committee counsel insisted that the secretary to the Committee was not a member of the Committee; but in passing it must be observed that though Malcolm Mason retired as secretary and he was replaced by Mrs. Irma Mason his wife, the original statement under § 211 of the Bankruptcy Act [11 U.S.C.A. § 611 (A. 171)] was never amended to reflect this change in personnel.

[8]The sections of the Bankruptcy Act dealing with corporate reorganizations [Chapter X] do not provide for class suits as such.

[9]No proof of stock claim was filed in the proceedings, and the actual filing of the petition was several years subsequent to the bar order of May 4, 1958. [*Protective Committee v. Anderson*, 364 F.2d 936 at 939, 5th Cir. 1968.] The representation of Mrs. Mason by counsel for the Committee was subsequent to Committee's discharge and prior to its restoration. So that there may be no confusion, Irma S. Mason is an attorney seeking interim allowance for fees, and she is the wife of Malcolm S. Mason.

Securities and Exchange Commission recommended an interim allowance of $60,000 and an additional sum of $10,000 as partial reimbursement of expenses.

The Trustee in accordance with his order of appointment filed a Report with the Reorganization Court, and inasmuch as the said Trustee and his counsel did not participate in the hearing involving the fee applications, the Trustee caused the entire record to be meticulously reviewed. In the Trustee's opinion, he reported to the Court that further investigation be had. ¶Thereafter, counsel for the Committee reiterated its request for interim allowance and reimbursement and the Trustee responded thereto. In addition thereto, the Trustee noticed all of the Committee members and its counsel for depositions. An application was made to the trial court for the entry of a protective order and for instructions as to the status of the Committee in the cause.

On October 9, 1969 the Reorganization Court, no doubt feeling that some fees were earned by counsel for the Committee which would not be affected by disqualification, did allow a partial interim fee and partial reimbursement for costs in the sum of $10,000 and $5,000, respectively; reserving jurisdiction over the parties and the subject matter to fully dispose of the application after additional investigation. The order further denied the application for the protective order and the request for instructions as to the status of the Committee in the cause. (A. 13-A. 18).

This application for writ of certiorari does not concern itself with the fourth matter contained in the October 9, 1969 order, to wit: the allowance of fees to the Special Master, since the Court of Appeals for the Fifth Circuit

denied the Committee leave to appeal that portion of the order.

Proceedings In The United States Court of Appeals For The Fifth Circuit

On November 10, 1969 counsel for the Protective Committee filed its Petition for Leave to Appeal the Order of October 9, 1969 to the United States Court of Appeals for the Fifth Circuit (A. 2).

Hereinafter this appeal will be referred to as the permissive appeal. It was subsequently assigned No. 29089 by the Clerk of the Court of Appeals for the Fifth Circuit.

While said application involving the permissive appeal was pending before the appellate court, counsel for the Committee did on November 13, 1969 file a Notice of Appeal in the trial court directed to said Court's Order of October 9, 1969 (A. 50).[10]

On November 15, 1969 the Trustee answered the Petition for Leave to Appeal theretofore filed in the appellate court by the Committee (A. 18).

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[10]Attention is directed to ¶28 of the Petition for Leave to Appeal dated November 8, 1969 (A. 50), where Committee counsel represents that as of that date it is currently appealing the order of October 9, 1969 as a matter of right. This representation is incorrect, and it is apparent that the opinion rendered by the Court of Appeals for the Fifth Circuit on October 27, 1970 relied upon this representation: "' . . . Appeal Two: At the same time, an appeal as of right by the committee was noticed from that part of the order which denied the motion for instructions and protection.'" [Opinion below at 806 (A. 64)]

Hereinafter this will be referred to as the appeal of right, subsequently assigned No. 29560 by the Clerk of the Court of Appeals for the Fifth Circuit.

No reference is made to the pleadings filed by the Securities and Exchange Commission in the proceedings before the United States Court of Appeals for the Fifth Circuit, because said agency supported to a high and concentrated degree the position assumed by counsel for the Stockholders Committee.

On December 12, 1969 the appellate court entered its order granting the Committee leave to appeal that portion of the October 9, 1969 order wherein the District Court allowed partial interim awards and reimbursement for Committee's counsel (A. 51). At this time the Clerk of the Court of Appeals for the Fifth Circuit assigned No. 29089 to the permissive appeal, previously designated as Misc. No. 1546.

On January 15, 1970 in response to a motion by counsel to the Committee, the United States Court of Appeals for the Fifth Circuit clarified its order of December 12, 1969 and denied, without hesitation or confusion, the Committee's seeking of leave to appeal those portions of the District Court's order of October 9, 1969 denying the motion for protection and instructions (A. 53).

On February 5, 1970 counsel for the Trustee obtained from the Clerk of the United States District Court for the Southern District of Florida a Certificate reflecting that the said Committee counsel failed as of that date to file its cost bond on appeal. This Certificate was filed with the appellate court on February 8, 1970 (A. 54).

On February 19, 1970 the appellate court entered its Order directing the now designated Appellants in said

Court to file a cost bond in accordance with Rule 7, F.R.A.P. [28 U.S.C., Rules, Rule 7, Federal Rules of Appellate Procedure], and further warned that a failure to comply with the letter and spirit of the appellate rules in the continued prosecution of the appeal would result in a dismissal. The motion of the Appellee to dismiss was denied (A. 55).

The Trustee filed a motion to dismiss the appeal of right [cause No. 29560] as counsel for the Committee did not prosecute the same in accordance with the applicable appellate rules. Committee counsel responded by filing a motion for extension of time for filing and docketing the said appeal. On March 30, 1970 the appellate court entered an order denying the Trustee's motion to dismiss and granting Committee counsel time to file and docket the appeal, with the warning that if the filing and docketing were not completed within 15 days of the order, the appeal would stand dismissed in accordance with Local Rule 9(b) of the United States Court of Appeals for the Fifth Circuit (A. 56).[11]

On April 9, 1970 [in the permissive appeal proceedings] the appellate court filed an order deferring the Appellant's motion to dispense with appendices until all parties filed their respective briefs, and granted to the Appellants a further extension of time to transmit the record to and including April 15, 1970 (A. 57).

Approximately at this time the appellate court denied the Appellee's motion to dismiss the permissive appeal

[11]As is noted in the Appendix, a clerical error erroneously designated this cause as No. 29089; it should have been designated as No. 29560, as it involved the appeal as of right.

because of the Appellants' failure to comply with the order of the appellate court entered February 19, 1970 (A. 58).

On May 8, 1970 the appellate court denied a motion filed by the Appellee to consolidate the permissive appeal and the appeal of right. It held in abeyance the request of Appellee for oral argument, and denied the Appellee the right to file a brief in excess of 70 pages but not exceeding 100 pages (A. 59).

On May 14, 1970, however, the appellate court ruled on the Appellee's motion for reconsideration of the Court's denial of the previous request for leave to file a brief in excess of 70 pages, and did enter its Order in the permissive appeal allowing the Appellee leave to file a brief limited to 91 pages (A. 60).

In both the permissive appeal and the appeal of right the Securities and Exchange Commission [an appellee] filed reply briefs to the briefs filed by the Appellee Trustee. Strict compliance with the Federal Rules of Appellate Procedure and the Local Rules of the United States Court of Appeals for the Fifth Circuit do not allow this procedure. However, on July 10, 1970 in the permissive appeal (A. 61), and on September 22, 1970 in the appeal of right (A. 62), the appellate court granted leave to the Securities and Exchange Commission to file reply briefs after the fact.

Oral argument was had on September 29, 1970. On October 27, 1970 the appellate court filed its per curiam opinion in the consolidated causes, reversing the trial court (A. 63).

On November 30, 1970 the appellate court entered its order in the consolidated causes allowing the Appellee to file a Motion for Rehearing and Rehearing En Banc out of time (A. 70).

On December 21, 1970, the appellate court entered its order denying the Petition for Rehearing and Rehearing En Banc (A. 71).

On December 29, 1970 the appellate court issued its judgment as a mandate in the consolidated causes (A. 72).

On January 25, 1971 the appellate court in the consolidated causes issued its order recalling its previously issued mandate and staying the same to and including February 24, 1971, allowing the Appellate to prosecute this petiton in the nature of an application for writ of certiorari to this Honorable Court (A. 73).

The foregoing facts and rulings, as contained in the orders and opinion of the United States Court of Appeals for the Fifth Circuit in the consolidated causes involving the permissive appeal and the appeal of right, give rise to this instant application for writ of certiorari to this Honorable Court, so that it may be afforded an opportunity to express its supervisory jurisdiction to correct the apparent errors, misapplications of law creating divergence of opinions amongst the various United States Circuit Courts of Appeals, and finally to express its opinion establishing a uniform application of certain portions of the Bankruptcy Act to be universally applied by the Trial and the appellate courts of the United States of America sitting as Courts of Bankruptcy.

Reasons For Granting The Writ

At the present time there is no clear, consistent, reconcilable basis established by the opinions of the various United States Circuit Courts of Appeals for the allowance of fees and reimbursements of costs to the various committees and their counsel provided for in Chapter X bankruptcy proceedings.

However, this instant application will deal only with the allowances involved to stockholders committees and their counsel.

The law in this field, while simple in its statutory form, is submerged with conflicts and contradictions created by the opinions establishing controlling law in the several appellate circuits. The problem is further compounded by variations within the individual circuits. This condition is sufficient to require this Court to exercise its appellate jurisdiction.

The per curiam opinion below[12] adds another conflict to an already overburdened and contentious background, and is a dangerous embarcation overriding the Congressional enactment to denude a reorganization trial court of its necessary and inherent jurisdiction to control awards of fees and to re-examine said awards at any time, by the substitution of the appellate tribunal as the trier of fact in such matters.

The opinion below further establishes a demarcation that an appellate court may entertain appeals out of time,

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[12]In re *TMT Trailer Ferry, Inc., Debtor, Protective Committee v. Kirkland*, supra [hereinafter referred to as "opinion below"].

thereby involving serious procedural matters interpreting the application of the Federal Rules of Appellate Procedure,[13] never before passed upon by this Court.

The opinion below is an additional step in diminishing and limiting the legislative delegation of jurisdiction to the district courts in Chapter X proceedings in fee matters and substituting therefor, contrary to the Act, an advisory, nonfact-finding administrative body to establish fees with such a finality that the district court, contrary to the provisions of the Act, is precluded from re-examining the recommended award.

Again, the opinion below approves a radical procedure for the application and proof required of counsel for a committee seeking fees and reimbursement of costs. It creates a rule of law providing for the filing of a vague and indefinite application, no requirement of proof by introducing evidence as to time expended, or benefit to the estate and finally expenditures may be reimbursed without the introduction of any proof. In place and instead of recognized procedures the applicant need only tender at the time of the hearing what purports to be the supporting evidence.

Thus the opinion below is in great conflict with established law and procedures of the several other circuits. However, more important, and contrary to the Act, it allows counsel for a Committee to be paid fees and reimbursements for services which duplicate the required services of the respective counsel for the trustee, the

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[13]Adopted December 4, 1967, effective July 1, 1968.

Securities and Exchange Commission, and the United States of America.[14]

Finally, this Court must invoke its supervisory jurisdiction to clarify the basic minimum and necessary limitations available to a reorganization trial court in Chapter X proceedings governing and controlling the establishing of a stockholders committee, the appointment of its counsel, the replacement of its counsel, giving consideration to the trial court's ability to supervise the activities of the committee and its counsel during the proceedings without minimizing their effectiveness by restraining such committees and their counsel in the discharging of their duties within the confines of the Act as the necessary situations arise in the administration of the estate.

Deep consideration should also be given to the limitations placed upon the committee and its counsel by the authorizations executed by the individual stockholders at the time they designated the Committee as their representatives.

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[14]§242 of the Bankruptcy Act [11 U.S.C.A. §642] specifically prohibits award of counsel fees to the attorneys or agents of the Securities and Exchange Commission and to the Commission itself. While the Act is silent as to awards for attorneys fees or other expenses involved in litigation to the United States of America, it has long been recognized that such awards of fees are with regularity not made [11 U.S.C.A. §642 (A. 173)].

Not involved in these proceedings is a situation where the court authorized counsel for the committee to discharge services required to be performed under the Act by the trustee — no order under G.O. 45 [General Orders in Bankruptcy adopted by the Supreme Court of the United States (28 U.S.C. Rules)] affecting counsel for the Committee was entered in these proceedings.

This Court's supervisory jurisdiction should be invoked to reverse the presumption attempted to be established that the Securities and Exchange Commission is an impartial governmental agency when it renders its recommendations in fee matters.[15]

The application for granting the petition for writ of certiorari addressed to the United States Court of Appeals for the Fifth Circuit therefore concerns itself with the following matters.

1. The opinion below permits an appellate court to exercise its jurisdiction where an appeal has been perfected out of time. These remarks are addressed to the appeal which the opinion below classifies as the appeal of right.[16]

Counsel for the Committee, the appellants below, failed to understand the procedures they were to utilize in exploiting the appeal.[17]

A careful reading of the record in the United States Court of Appeals for the Fifth Circuit and the opinion below establishes that a notice of appeal filed on the thirty-fifth day, without any order in the trial court extending the time within which the notice of appeal is to be filed, gave appropriate appellate jurisdiction. This

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[15]In Chapter X proceedings the Securities and Exchange Commission has unique status. While it has a right to be heard and intervene in all matters in the trial court, it cannot institute appeals of leave or of right [§§ 24 and 250 of the Bankruptcy Act (11 U.S.C. §§ 47 and 650) (A. 63, A. 175); Rule 6, F.R.A.P. (A. 183)].

[16]Cause No. 29560 assigned to said appeal by the Clerk of the appellate court below.

[17]Petition for leave to Appeal at A. 4 and A. 10.

is not the law, and is contrary to every pronouncement in this field.[18]

The provisions in the appellate rules allowing for an appeal to be perfected within sixty days subsequent to the entry of the order involved if the United States is a party, though the appellants below sought to create this impression,[19] was not applicable to these proceedings.[20]

In furtherance of the argument of the inapplicability of the sixty-day period to the instant cause, we direct attention to the applicable provisions of Chapter X of the Bankruptcy Act which prohibit the Securities and Exchange Commission [hereinafter referred to as the SEC] from commencing permissive appeals or appeals of right.[21]

It therefore is apparent that if the new Federal Rules of Appellate Procedure supercede the statutory limitation,[22] the thirty-day bar period is operative.

This Court has never ruled upon this question and it appears to be one of major importance in view of the active participation of the SEC in the many now pending Chapter X reorganization matters in the courts.

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[18]Rule 4, F.R.A.P. (A. 180); see *United States v. Robinson*, 1960, 361 U.S. 220, 80 S.Ct. 282, 4 L.Ed.2d 259.

[19]Paragraph 30 of the Petition for leave to appeal (A. 12) alleges the proper time for filing of appeals, permissive or by right, should be sixty days because the Securities and Exchange Commission was an agency of the United States Government.

[20]28 U.S.C. § 2107 (A. 175) provides: "This section shall not apply to bankruptcy matters or to proceedings under Title 11 *(official statutory reference omitted)*."

[21]§ 209 of the Bankruptcy Act [11 U.S.C. § 609] (A. 170).

[22]Rule 4, F.R.A.P. — 28 U.S.C. § 2107.

Once the appellate court classified the appeals in categories of permissive and right, it was estopped from entertaining the appeal of right which was filed out of time.[23]

Underlying the basic problem is the conflict and cross-conflict as contained in the opinions of the various Circuit Court of Appeals, creating confusion not only between the circuits but within the circuits. This conflict and confusion centers upon the distinction of the terms "proceedings in bankruptcy" and "controversies in bankruptcy". This underlying difficulty cannot be overlooked in disposing of the problem. Minute distinctions affecting appeals as a matter of right in proceedings in bankruptcy have been developed, creating greater conflict between the circuits.

The following cases will bring into focus more sharply the conflicts existing: *Georgia Jewelers, Inc. v. Bulova Watch Co.*, 5th Cir. 1962, 302 F.2d 362 [holding that an order not having definite final operative ruling is not appealable under any circumstances]; compare with *Freeman v. Seligson*, 2nd Cir. 1968, 405 F.2d 1326 [§ 21a matter[24]]; *In re Commonwealth Financial Corp.*, 3rd Cir. 1969, 408 F.2d 640, cert. denied sub nom *Thal v. Commonwealth Financial Corp.*, 1969, 395 U.S. 961, 89 S.Ct. 2104 23 L.Ed.2d 748 [question of a protective order in a Chapter X § 167 investigation[25]].

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[23] *In re TMT Trailer Ferry, Inc., Debtor, Protective Committee v. Kirkland*, supra, at 806.

[24] 11 U.S.C. § 44a.

[25] 11 U.S.C. § 567.

However, in *Cope v. Aetna Finance Co. of Maine*, 1st Cir. 1969, 412 F.2d 635 at 639, the First Circuit is in accord with the Fifth Circuit in *Georgia Jewelers, Inc. v. Bulova Watch Co., supra*, and appears to be in harmony with *Hoehn v. McIntosh*, 6th Cir. 1940, 110 F.2d 199.

Yet there are inconsistencies within the respective circuits. Examine the opinion below and compare with *Georgia Jewelers, Inc. v. Bulova Watch Co., supra*, and *City of Fort Lauderdale v. Freeman*, 5th Cir. 1952, 197 F.2d 122 at 124.

Compare opinions of the United States Court of Appeals for the Second Circuit in *Henry Ansbacher & Co. v. Klebanow*, 2nd Cir. 1966, 362 F.2d 569, and *Freeman v. Seligson, supra*, with *Lesser v. Migden*, 2nd Cir. 1964, 328 F.2d 47, and *Hotel Governor Clinton, Inc.*, 2nd Cir. 1939, 107 F.2d 398.

While the United States Court of Appeals for the Third Circuit has apparent harmony with the Second Circuit, *In re Commonwealth Financial Corp., supra*, a clear distinction within that circuit appears in *In re Imperial "400" National, Inc.*, 3rd Cir. 1968, 391 F.2d 163.

The Eighth Circuit stands with the First and Sixth Circuits, and with the Fifth Circuit when the last Circuit applies *Georgia Jewelers, Inc. v. Bulova Watch Co., supra*, and *City of Fort Lauderdale v. Freeman, supra;* see *Metal Fabricators, Inc. v. Granite City Steel Co.*, 8th Cir. 1966, 357 F.2d 175; *Standard Electronics Corporation v. Kenneally*, 8th Cir. 1964, 336 F.2d 394.

The Seventh and Tenth Circuits can be classified along with the Sixth and Eighth Circuits. [*Woodmar Realty*

Co. v. McLean, 7th Cir. 1962, 306 F.2d 479; *General Electric Co. v. Beehive Telecasting Corp.*, 10th Cir. 1960, 284 F.2d 507.[26]

All of this conflict must be examined in light of this Court's admonishment that since the passage of the Chandler Act there was a practical abolition of the distinction between appeals as of right and those by leave [*Albin v. Cowing Pressure Relieving Joint Co.*, 1942, 317 U.S. 211, 63 S.Ct. 170, 87 L.Ed. 212].

If this early pronouncement is to be reestablished and vitalized in the spirit of uniformity now prevailing in rule promulgation on all levels of litigation, how will such a doctrine be limited or expanded by the Federal Rules of Civil Procedure, where they are not inconsistent with the Bankruptcy Act,[27] and what of the applicability of the newly promulgated Federal Rules of Appellate Procedure.[28]

In view of the foregoing it is highly problematical that the portions of the October 9, 1969 order allowing **partial interim** fees and reimbursement of costs, as well

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[26]Consideration should be given to the standard principle that orders requiring or denying discovery proceedings or refusing to enter protective orders therein, are not final and therefore not appealable [*Cogen v. United States*, 1929, 278 U.S. 221, 49 S.Ct. 118, 73 L.Ed. 275; see also 4 *Moore's Federal Practice*, pp. 1712-1715; see also as to application of said principle in bankruptcy matters — *Farrar, The Appealability as of Right of Interlocutory Discovery Orders in Bankruptcy, 23 U.Miami L.Rev. 366 (1969)*].

[27]21b of the Bankruptcy Act [11 U.S.C. 44b] and G.O. 37 [General Orders in Bankruptcy adopted by the Supreme Court of the United States; 28 U.S.C.]

[28]Rule 6, F.R.A.P. (A. 183). If it can be implied that the Federal Rules of Appellate Procedure are subject to the provisions of G.O. 37 by implication, then permissive appeals provided for in Rule 5 F.R.A.P. appeals 28 U.S.C. § 1292(b) would be controlling, thereby compounding an already irretrievabley confused situation.

as the denial of instructions and protection, were appealable.

Whether the appellant below was a proper party to urge the appeal see *In re American Mail Line*, 9th Cir. 1940, 115 F.2d 196 at 198, for an apparent conflict, a ruling that the recipient of the allowance has no standing to urge that the trial court in granting his petition wrongly exercised its jurisdiction in his favor. Abuse of discretion may be urged by such person only where the court has declined to allow him any compensation. Where the allowance is made, the recipient may only urge that it was "unreasonable". The appeal below dealt with an abuse of discretion.

2. It is basic that an appellate court, upon remand to the trial court of a Chapter X bankruptcy matter, cannot divest the trial reorganization court of its inherent jurisdiction to examine and re-examine claims and partial interim fee awards.

Subsequent to this Court's opinion and remand to the trial court, the Committee was reinstated, no reference to the 1968 opinion of this Court[29] was made at that time.

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[29]"Without in any way prejudging the issue, it is possible that when the compromises discussed in Part II of this opinion are reconsidered, and when the company is properly valued by taking into account its future prospects, the company will be found not to be insolvent. Such a finding would permit stockholders to participate. There is, therefore, no point in considering at this juncture the question presented by the petitioner concerning the stockholders' claims under the federal securities laws. Since the Committee will, of course, be entitled to participate in the new hearings on valuation and insolvency, the order of the District Court discharging it is vacated. *So doing, however, reflects no opinion on the merits of the arguments presented in this Court by petitioner as to why it should not have been discharged.*" [*TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414 at 433, 88 S.Ct. 1157, 20 L.Ed.2d 1]. *Emphasis ours*

The opinion below denudes the trial court of its statutory jurisdiction to re-examine claims,[30] and is contrary to the those provisions of the 1968 opinion of this Court where this matter was aired.

A reading of the opinion below places a further limitation on the trial court's jurisdiction concerning "disqualification".[31]

3. The various Circuit Courts of Appeals have through inadvertence and error elevated the SEC to a fact-finding agency status when it participates in Chapter X bankruptcy proceedings, rather than an advisory body as designated by the Act.

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[30]§ 57k of the Bankruptcy Act [11 U.S.C. § 93k] (A. 164); *Katchen v. Landy*, 1966, 382 U.S. 323, 86 S.Ct. 467, 15 L.Ed.2d 391.

[31]Counsel for the SEC in oral argument before the United States Court of Appeals for the Fifth Circuit commented upon the limitation of disqualification and suggested that the same be in accord with § 249 of the Bankruptcy Act [11 U.S.C. § 649]. Yet this Court has recognized greater grounds for disqualification than those set forth in the foregoing statute; *Wolf v. Weinstein* (1963), 372 U.S. 633 at 641, 83 S.Ct. 969, 10 L.Ed.2d 33; *Woods v. City National Bank and Trust* (1941) 312 U.S. 262, 61 S.Ct. 493, 85 L.Ed. 820. To appreciate the depth of disqualification, attention is called to Judge Clark's United States Court of Appeals for the Second Circuit opinion in *Finn v. Childs* (1950), 181 F.2d 431 at 444, where Judge Clark relied upon the dogma set down by this Court, when he observed that grounds for disqualification need not be limited to § 249 of the Bankruptcy Act in the following language: "Indeed it is the rule in any reorganization under Chapter X that, whenever anyone undertakes to act on behalf of any part of a class he becomes the representative of the whole class and may not deal for any part of it alone."

In view of the status of the record and the opinion below, the trial court is divested of its jurisdiction to make a full inquiry as to the effect of the ill-fated attempt of counsel for the Committee representing a stockholder [now a participant in the fee allowance as an attorney] to have her stockholder position reclassified as a general unsecured claim (A. 160), and the effect that such representation would have had on the fee application in light of the case law set forth heretofore.

Because of the unique position the SEC holds in Chapter X bankruptcy proceedings, it can never be deemed impartial.[32]

The agency is constantly seeking assistance from parties involved in Chapter X matters to lodge appeals, i.e., commence the appellate undertaking to afford the SEC voice in the appellate courts, since as we have seen, it cannot do so for itself. An analogy may be drawn to this type of undertaking with conduct which this Court frowned upon. See *Mosser v. Darrow*, 1951, 341 U.S. 267, 71 S.Ct. 680, 95 L.Ed. 927.[33]

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[32]§ 209 of the Bankruptcy Act [11 U.S.C. § 609] (A. 170).

This Honorable Court in its 1968 opinion directed the necessity to establish the value of the debtor's business as a going concern prior to the confirmation of a plan of reorganization. [*TMT Trailer Ferry, Inc. v. Anderson, supra,* at 441.] This directive was in accordance with the Act.

After the cause was remanded to the trial court and after the hearing on the application for fees by Committee counsel was terminated, without knowledge of the reorganization court, the new Trustee or his attorney, a conference was held in the offices of the SEC in Washington, D.C., attended by representatives of the agency, counsel for the Committee, and representatives of general creditors, where the representatives of the SEC and counsel for the Committee sought to bargain a position of new stock distribution in the company, without evaluating the debtor. The bargaining terminated when the attorneys for the Committee refused to accept 25% of the new stock issue to be divided amongst pre-reorganization stockholders, leaving 75% of the issue for unsecured creditors.

The foregoing shows not only partiality by the SEC, but displays conduct which the reorganization trial court could take into consideration in fee allowance. NOTE: A happening subsequent to the hearing.

[33]While a side light to this aspect is the weight that the opinion below attributes to the efforts of Committee counsel in respect to this Court's review of 1968, this Court is in a much better position to judge in this regard. We call to the attention of this Court footnote 8 in the opinion of Mr. Justice White, *TMT Trailer Ferry, Inc. v. Anderson,* supra, at 424, wherein the opinion recognizes the ability of counsel for the SEC to succinctly state the issues.

While the adage that one cannot argue with success is universal, one must examine minutely the procedure and the method in achieving success.

The degree of this lack of impartiality is represented in the agency's defense of counsel for the Committee when the latter represented one of their number in an attempt to have her stock holdings reclassified as a general unsecured claim. The agency argued that since the issue of reclassification was not decided, no conflict or disloyalty was apparent since a determination of the issue was not had and thus at that stage of the proceedings the presentation of conflict and divided loyalty was premature [See *Wolf v. Weinstein, supra,* note 32, *Woods v. City National Bank and Trust, supra,* note 32, and *Finn v. Childs, supra,* note 32].

Thus, whether by design, omission, inadvertence, or neglect, the trial and appellate courts have bestowed upon the Commission a status not afforded by the Act, and one to which it is not entitled, since the Commission discharges its advisory capacity in a manner which does not include its own independing fact-finding investigation.[34]

There is nothing in the Congressional enactment which requires the blind acceptance of an SEC recommendation as to fees as the basis for overruling a partial interim award of a trial reorganization court, where the order making the award reserves jurisdiction to make further inquiry of the fee applicants and their activities. This portion of the opinion below places the Fifth Circuit in direct conflict with the Sixth and Eighth Circuits [See

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[34]The usual procedure in the Commission is simply this: a copy of the transcript of the hearing, along with the application and any objections, are reviewed by the attorney assigned to the case, who then makes his suggestion, which in turn is acted upon in the higher echelons in the Commission, and appropriate recommendations are thus made. Hence, the people making the recommendation are at least once or twice removed from the proceedings.

Inland Gas Corp., 6th Cir., 1962, 309 F.2d 176; *Detroit International Bridge Co.*, 6th Cir. 1940, 111 F.2d 235; *Cooke v. Bowersock*, 8th Cir. 1941, 122 F.2d 977 at 985].

Compare status of the SEC in matters other than fee applications, in relation to the requirements that the positions forwarded by the agency are only advisory, and it is not mandatory that they be accepted. [*In re American National Trust; Bradshaw v. Loveless*, 7th Cir. 1970, 426 F.2d 1059 at 1066.]

In applying the Public Utility Holding Companies Act of 1935,[35] reorganization trial courts are not required to accept fee recommendations by the SEC, even though the agency is granted a statutory right to set awards of compensation, if the agency's findings are not supported by substantial evidence [See *North American Light & Power Co.*, 3rd Cir. 1953, 202 F.2d 638; see opinions below, (1952) 106 F.Supp. 686, and (1951) 101 F.Supp. 931; also *Standard Gas & Electric Co. v. Securities and Exchange Comm.*, 8th Cir. 1954, 212 F.2d 407].

The opinion below creates greater conflict amongst the circuits and clearly express an overreaching of the application of appellate jurisdiction.

4. It appears that there has been a rule of law in the United States Court of Appeals for the Fifth Circuit that allows said court to become a trier of fact in Chapter X bankruptcy fee awards.

This has been a policy of long standing in the Fifth Circuit [*Campbell v. Green*, 5th Cir., 1940, 112 F.2d 143;

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[35]15 U.S.C. § 79k(e), (f) (A. 176).

reaffirmed *Massachusetts Mutual Life Ins. Co. v. Brock*, 5th Cir. 1969, 405 F.2d 429.]

The practice in the other Circuits where said appellate courts deem the action of the trial reorganization court inappropriate, is to reverse and remand the matter under direction [*In re Imperial "400" National, Inc.*, 3rd Cir. 1970, 432 F.2d 232 at 237; *Finn v. Childs, 2nd Cir., supra*].

Hence another conflict between the circuits since the court below, in relying upon its own expertiseness from a review of the trial record, not only overrules the trial court, but actually becomes a trier of fact and sets the fees.

It therefore is necessary to determine whether or not, in reaching the opinion below, reversible *trial error* was committed.

Therefore, this application must deal in a cursory manner with the errors committed by the appellate tribunal when it acted as a trial court.

The application filed by counsel for the Committee for fees and reimbursement of costs, to say the least, was sketchy and inadequate since sufficient detail was lacking. The opinion below held the application sufficient so that an award could be made by it.[36]

This approach is in direct conflict with the settled law in the Second, Third, Sixth, Seventh, Eighth and Ninth Circuits on this matter. [See *Chicago & West Towns*

[36]For this reason it was necessary to include in the annexed Appendix pertinent portions of the record in the trial court, which in fact actually became a part of the record in the United States Court of Appeals for the Fifth Circuit.

Railway v. Freidman, 7th Cir. 1956, 230 F.2d 364; *In re Detroit International Bridge Co.*, 6th Cir. 1940, 111 F.2d 235; *In re Kentucky Electric Power Corp.*, W.D.Ky. 1935, 11 F.Supp. 528; *Creditors Committee of Fox Markets, Inc. v. Ely.*, 9th Cir. 1964, 337 F.2d 461; *Cooke v. Bowersock, supra; Matter of Porto Rican American Tobacco Co.*, 2nd Cir. 1941, 117 F.2d 599; *In re Progress Lektro Shave Corp.*, 2nd Cir. 1941, 117 F.2d 602; *Milbank, Tweed & Hope v. McCune*, 4th Cir. 1940, 111 F.2d 100; *Hudson & Manhattan Railroad Co.*, 2nd Cir. 1964, 339 F.2d 114; *In re Imperial "400" International, Inc., 432 F.2d 232 supra.*

Again, the opinion below stresses that counsel for a stockholders committee may duplicate the services performed by the attorney for the trustee, and attorneys for the SEC and the United States of America, and such duplicate services are to be taken into consideration in the allowance of fees.

There is no basis for this radical departure from the statutes or from the law as settled in the various circuits.

To arrive at this erroneous conclusion, the per curiam opinion below bastardized the well-considered decision of Circuit Judge Clark in his opinion filed in *Finn v. Childs, supra.*

The departure commences with an observation in the opinion below that such procedures as to award of allowances of this kind is proper, [relying upon 6A *Collier on Bank.* § 13.10]. This reference to *Collier* limits compensation to duplication of services where the same occur when many representatives of small groups or individuals are involved in a Chapter X proceedings, thus duplication can-

not be avoided, citing as the basis for said narrow application *Finn v. Childs, supra.* The reading of that decision brings one to a conclusion of allowing fees in a limited manner if there is duplication by these groups. But the opinion below, while relying upon this reference in the text, fails to give any weight to another warning set forth by the same author, to wit, that services rendered which are duplications of required duties of officers of the estate or their attorneys are not compensable, even though they are beneficial to the administration of the estate. Services rendered on a voluntary basis, without obtaining court approval or direction prior to commencing said services, even though generally helpful or beneficial, cannot be compensable from the estate. The limitation further precludes compensation where services duplicate the efforts of attorneys for the agencies of the United States of America, if any there be involved in the proceedings [6A, *Collier on Bankruptcy,* § 13.02, pp. 917- 918 14th Ed.].

We now find that this particular portion of the opinion below is in conflict with the doctrine enunciated in the Second, Third, Sixth, Seventh and Ninth Circuits [See *Finn v. Childs, supra; Imperial "400" National, Inc., 432 F.2d 232 supra; Creditors Committee of Fox Markets, Inc. v. Ely, supra; Detroit International Bridge Co., supra; Chicago & West Towns Railway v. Freidman, supra.* But for an erudite discussion forbidding the award of fees for services which duplicate those rendered by other parties, two companion cases of the Second Circuit are essential reading. [See *In re Progress Lektro Shave Corp., supra,* and *Matter of Porto Rican American Tobacco Co., supra.*

Finally, the opinion below completely disregarded the right of the trial court to retain jurisdiction over the

subject matter and the parties to make a further investigation because of the new and additional facts revealed to the district court subsequent to the hearing on the application, when the supplemental statement was filed under § 210 of the Bankruptcy Act (A. 158).

5. Since the enactment of the Chandler Act amending the Bankruptcy Act in 1938, this Court has never settled the procedures to be utilized in the selection of stockholders committees, their counsel, and the limitation of such committees and their counsel, not only by the Act, but by the executed authorizations selecting the committee.

No expression has ever been made by this Court as to what limits are imposed upon said committees and their counsel as to their rights to be heard, on what particular matters they may be heard; and if such committees by their designation as parties entitled to receive notice, have in fact gained complete intervention into the proceedings.

The Court has never expressed an opinion concerning the effect of the statutory limitations as well as how stockholder authorization curtail committee activity as to voting of claims, approval of plans and confirmation of plans, wherein said facets would affect fee allowances and reimbursements to such committees and their counsel where services are performed beyond these limits.

By statute a committee is prohibited from voting a claim, and only individual creditors or stockholders or their respective attorneys can vote to confirm a plan [§ 179 of the Bankruptcy Act (11 U.S.C. § 579) (A. 167)].

The individual authorizations executed by the stockholders prohibit, in the present case, the committee, not only from voting, but from dissenting or consenting to any plan of reorganization (A. 47).

The Act clearly distinguishes between the approval of a plan and confirmation of a plan [§§ 170 and 175 of the Bankruptcy Act (11 U.S.C. §§ 570 and 575) (A. 166, A. 167)].

Thus, if committees can only participate up to approval or disapproval of a plan, and they as such are precluded from voting for or against the plan, does the demarcation in the Act prevent or preclude the committees and their counsel from objecting to confirmation of a plan and appealing an adverse ruling on confirmation. Bearing in mind that § 180 of the Bankruptcy Act [11 U.S.C. § 580, (A. 168)] reserves to the individual stockholder, an indenture trustee, a creditor and the debtor, the right to object to confirmation and the right to appeal an order of confirmation. Committees are not one of the group permitted to appeal orders of confirmation.

The statutory enactment specifically sets forth that committees and their counsel are to obtain reimbursement of costs and compensation in connection with a plan approved by the judge, whether or not accepted or finally confirmed, provided the services rendered are beneficial [§ 242 of the Bankruptcy Act (11 U.S.C. § 642) (A. 173)].

With this limitation in the statute, a committee and its counsel, though effectively resisting confirmation, act as a volunteer, is precluded from being awarded fees for such services [*In re Progress Lektro Shave Corp., supra; Matter of Porto Rican American Tobacco Co., supra*].

There is a decided difference between the right to be heard and the right to intervene in Chapter X proceedings [*Kenmore-Granville Hotel Co.*, 7th Cir. 1937, 92 F.2d 778, cert. denied 302 U.S. 767, 58 S.Ct. 481, 92 L.Ed. 596; *Flour Mills of America*, D.C.Miss. 1939, 27 F.Supp. 559].

The Committee was granted a right to be heard and to receive notices. Controry to the contention of counsel for the Committee, they were not appointed by the trial court. They were designated to receive notice for and on behalf of the Committee, and nothing more. (A. 88)[37] If this designation did not allow the Committee to intervene — for intervention usually contains a general right to intervene, or intervention on specific matters only — then what effect would this failure have on the application for fees?

While stockholders as a matter a right can be heard individually at all times,[38] committees must seek the right and the court must designate them as a party entitled to be heard and receive notice [§ 207 of the Bankruptcy Act (11 U.S.C. § 607) (A. 169)].

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[37]If counsel for a committee is appointed by the court, then replacement of such counsel is an intricate problem. Defects such as notice and an amendatory order may severely affect allowance of fees where orders substituting counsel were not applied for and obtained. On the other hand, if counsel is appointed independent of court authority, but tenure and replacement are dependent upon judicial approval, what is the effect of replacement without notification to the court in relation to fees?

[38]Provided they have filed their claims as stockholders and have been designated as parties entitled to be heard and receive notice. In this instance they are deemed intervenors.

This Court has never ruled upon the efficacy of a committee that is authorized to act for individual stockholders where the stockholders are not to be charged any costs or fees, such items to be forthcoming from the estate, and the committee itself makes no expenditure of costs, while its counsel seeks to recover an expenditure in excess of $18,000.00.

It would appear that the time is ripe for this Court to exercise its great supervisory authority to set forth clearly and distinctly the responsibilities of committees and their counsel in Chapter X reorganizations.

Counsel for the Committee deems that there is no limitation on the services they can render in these proceedings. A careful reading of their application for leave to appeal (A. 2, supra) leaves one with the impression that Committee counsel, without obtaining appropriate orders, intend and will render services which will duplicate the services of the attorney for the Trustee and for the SEC. The procedure is clear that they will seek to burden the estate with unwarranted demands for payment for such unnecessary, duplicative services. Therefore, the effect of an order of instructions will no doubt be regarded by said counsel as authorization from the trial court to render said duplicate services and be paid for the same.

Unless this Court establishes a rule of law settling the matter in accordance with the statutory limitations and judicial pronouncements banning compensation for duplication of services, even though such services be voluntary or beneficial, many estates will be burdened with payment of attorneys fees far beyond proportion.

CONCLUSION

The proceedings in the United States Court of Appeals for the Fifth Circuit must be reviewed to correct apparent errors, not only as set forth in the opinion below, but its attempt to divest the trial reorganization court of its jurisdiction must not be left undisturbed.

The existing conflict between most if not all of the circuits is magnified by the opinion below, since it contains many more departures from accepted standards. if left undisturbed its impact upon the administration of the Bankruptcy Act in Chapter X proceedings will be devastating.

A clear enunciation of the limitations of the advisory status of the SEC is required, as well as the rendition of directives to both the trial and appellate courts in regard to the effective exercise of their respective jurisdictions to prevent interference each with the other.

Hence, of necessity this Court must exercise its supervisory jurisdiction to set judicial standards and limitations to govern committees and their counsel. A complete disposition of the foregoing problems will add to a greater effective and appropriate administration of the Bankruptcy Act by the courts, in accordance with the Congressional dictate.

Dated at Miami, Florida, this 23rd day of February, 1971.

Respectfully submitted,

IRVING MARK WOLFF, P.A.
Attorney for Petitioner

By IRVING M. WOLFF
IRVING M. WOLFF

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 1385

In the Matter of: TMT TRAILER FERRY, INC., et al.,
THOMAS J. KIRKLAND, as Trustee for
TMT TRAILER FERRY, INC., et al.,

Petitioner,

v.

PROTECTIVE COMMITTEE FOR INDEPENDENT
STOCKHOLDERS OF TMT TRAILER FERRY, INC., et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF THE PROTECTIVE COMMITTEE FOR INDEPENDENT STOCKHOLDERS OF TMT TRAILER FERRY, INC. et al. IN OPPOSITION

Irma S. Mason

4740 Connecticut Avenue, N.W.
Washington, D.C. 20008

Irwin L. Langbein

301 Citizens Building
West Palm Beach, Florida

Counsel for Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc., and individual respondents Malcolm S. Mason, Irma S. Mason, Irwin L. Langbein

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This brief is on behalf of respondent Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc., ("committee") and of Malcolm S. Mason, Irma S. Mason and Irwin L. Langbein, individual respondents ("committee counsel") in opposition to the petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

In the court of appeals the committee was appellant in appeal # 29560, the committee and its counsel appellants in appeal # 29089; the appeals were consolidated and the decision below was rendered in the consolidated appeal.

QUESTIONS PRESENTED

I. Whether a stockholders committee and its counsel in a Chapter X reorganization may be protected by the Court of Appeals against wilfull hazing by the trustee's attorney which the district court declined to correct.

The Court of Appeals granted protection against such harassment.

II. Whether interim compensation to counsel for a stockholders committee for services in a Chapter X reorganization may be determined by the Court of Appeals in its own independent judgment where that court found the district court had made a grossly inadequate award, and the services, chiefly opposition to three successive reorganization plans (described in *Protective Committee v. Anderson*, 390 U.S. 414, esp. at 418-423), are on the record and largely within the direct knowledge of that court.

The Court of Appeals held that it could determine appropriate compensation and made an award.

III. Whether the power of the Court of Appeals to consider the issue of protection from harassment is barred by the filing date on a notice of appeal 35 days after entry of the order denying protection

a) where appellant holds the district court's deputy clerk's timely receipt and asserts that the notice of appeal was timely in fact, and

b) where relief from harassment was sought by petition for leave to appeal (originally denied) and also by notice of appeal, the Court of Appeals having later reconsidered its denial of leave to appeal and having consolidated, on trustee's request, the appeal from the harassment with the allowed timely permissive appeal already before the court on the related issue, in the same district court order, of inadequate compensation, and

c) where the Federal Rules of Appellate Procedure extend the filing period for notice of appeal to 60 days, a

government agency, here the SEC, being a party and active participant, and

d) where the alleged jurisdictional defect, first raised here, was never presented to the court of appeals during the ~~14~~ 15 months from notice of appeal to the petition for certiorari.

The question of jurisdiction does not in any event affect the fee award to committee counsel which, pursuant to statute (11 U.S.C. § 650, § 250 of the Bankruptcy Act), was appealed under allowance by the court of appeals of timely petition for leave to appeal.

Neither the foregoing restatement of questions nor any other questions asserted by the petition are remotely worth the attention of this Court.

RESTATEMENT

Petitioner's statement of the case reflects inaccuracies and omissions. We have accordingly restated the principal facts.

Background

In a Chapter X reorganization initiated in 1957, the stockholders committee had been authorized by a small number of stockholders to represent them in the district court or any other courts and in the negotiation and development of plans but not in voting (Pet. App. A. 47). No other person has undertaken to represent the interests of independent stockholders (Pet. App. A. 85, A. 159). The committee was designated by the district court to represent stockholders (Pet. App. A. 88).

Citation conventions: Pet. App. A.___, Appendix to Petition; Ct. Ap. App. ___, Appendix (3 vols.) printed for use of the court of appeals, part of the record below, requested by respondents to be certified and transmitted to this Court. References to documents filed in the Court of Appeals are designated by title and date; district court filings are designated OR with Docket number.

The committee opposed three erroneously confirmed plans of reorganization which improperly excluded stockholders. The third plan, sustained by the court of appeals, was set aside on writ of certiorari successfully sought by the committee (*Protective Committee v. Anderson*, 390 U.S. 414, rehearing denied 391 U.S. 909).

Proceedings in the District Court

Upon remand, the committee faced protracted and difficult further proceedings (*Protective Committee v. Anderson, supra*, at 441, 453), to be supported without financial assistance unless fees to the committee and its counsel were awarded by the court.[1]

The committee and its counsel accordingly sought expense reimbursement and interim fees on account for services through the remand (Ct. Ap. App. 129).[2] After vigorous contest by the trustee and major creditors (Ct. Ap. App. 146, 147, 152, 157, 197, 199, 204, 206, 211) and an evidentiary hearing (Ct. Ap. App. 793) the district court held that under the "exceptional circumstances" interim fees should be awarded and would be fixed in amount without any further hearing after receipt of a recommendation requested from the Securities and Exchange Commission (SEC) (Ct. Ap. App. 840-841).

The SEC recommended $60,000 on account of fees plus $10,000 on account of disbursements (Ct. Ap. App. 263) on committee counsel's request for $100,000 on account

[1]The effective prohibition against private financing of either committee or counsel was stated in our Motion to Dispense with Printing, in this Court, Case #952, October Term 1966, June 6, 1967, par. 6; see also cases collected in 30 SEC Annual Report (1965) 100, 31 SEC Annual Report (1966) 98; Application of Counsel for Reimbursement of Disbursements and for Interim Fees (Ct. Ap. App. 129).

[2]Contrary to the statement, Petition p. 8 ftn 5, that the "petition in its entirety is set forth at A. 90 to A. 155," the application itself is not included in Petitioner's Appendix. The document at A. 90-155 is a supporting Statement of Time and Disbursement.

of fees plus roughly $18,000 reimbursement for what was then eleven years of service (Ct. Ap. App. 139). District court action on the application for fees was delayed: entry of award was postponed by ex parte order (Ct. Ap. App. 764) as a result of erroneous charges against committee and counsel by the new attorney for the new trustee, alleging conflict of interest, exceeding authority and improper designation of one of committee counsel (Ct. Ap. 331-2). Refutation of these charges by citation to the eleven-year record (Ct. Ap. App. 352-366) was followed by a course of harassment: further false charges, legally invalid objections to compensation for pre-remand services, denial of compensability of post-remand services and threats of opposition to compensation for future services (Ct. Ap. App. 369-396), scheduling depositions requiring attendance in Miami of committee and counsel resident in California, New York and Washington, D.C. (Ct. Ap. App. 367-8) concerning matters already of record (Ct. Ap. App. 431-462) characterized by the SEC as "diversionary procedures and contentions" (Ct. Ap. App. 463, 471).

The committee was forced to move in the district court for protective order against the harassment and the depositions and for instructions as to the future role of the committee (Ct. Ap. App. 397). Nine months after the fee hearing, the district court awarded $10,000 fees and $5,000 disbursements coupled with *in terrorem* conditions (Pet. App. A. 8-9); in the same order, the committee's motions for instructions and protection were denied (Pet. App. A. 13).

The order of the district court was filed October 9, 1969. Time to appeal expired, if the 30-day rule applies, at the earliest on November 10, 1969, November 8 being a Saturday (Rules 4(a), 6(a), 26(a), Federal Rules of Appellate Procedure). On November 8 committee counsel in Florida put in the mail, return receipt requested, both a petition for leave to appeal addressed to the court of appeals and a notice of appeal addressed to the district court.

Post office records recited that both clerks physically received the documents on November 10 and receipted for them (Pet. App. 51, OR 1391). Both clerks stamped them as of later dates: November 11 in the Court of Appeals, November 13 in the district court.

Proceedings in the Court of Appeals

By petition for leave to appeal review was sought of both parts of the district court order—the fee award and the denial of protection/instruction—on the ground that both were integral parts of the same central issue: whether a stockholders committee may be driven out of a protracted reorganization by inadequate compensation and deliberate harassment (Pet. App. A. 3, 8-11; see A. 64-65). The petition for leave to appeal expressly referred to the concurrent notice of appeal from the denial of protection/instruction as precautionary (Pet. App. A. 3 ¶4).

Trustee's answer to the petition for leave to appeal challenged the jurisdiction in the court of appeals for out-of-time filing (Pet. App. A. 19). Upon submission of signed receipt dated November 10, attached to Motion for Correction of Docket Entry dated November 19, 1969, the record was corrected by the court of appeals to show timely filing (Pet. App. A. 51). The court of appeals granted leave to appeal the fee award and denied leave to appeal the protection/instruction issue which was then perfected as an appeal of right initiated by notice of appeal.

Trustee's attorney made six unsuccessful attempts to abort[3] the proceedings before reaching the merits. Trus-

[3] 1. Trustee's Answer to petition for leave to appeal, Nov. 14, 1969, alleging no jurisdiction for late filing (Pet. App. A. 19), and

2. Motion to Dismiss the appeal, Jan. 23, 1970, for alieged late filing of Committee brief, and

3. Objection to Committee and SEC designation of record, requesting dismissal of appeal, Feb. 6, 1970, and

4. Response, requesting dismissal of appeal for lack of second cost bond, Feb. 6, 1970 (on items 2, 3 and 4, see Pet. App. A. 55), and

tee's attorney never put in issue lack of jurisdiction for out-of-time filing of the notice of appeal—in fact he acknowledged that it had been filed simultaneously with the petition for leave to appeal (Trustee's Response dated February 6, 1960, to Committee's Opposition dated January 30, 1970, to Trustee's Motion to Dismiss Appeal dated January 23, 1970, for alleged late filing of brief) and his motion to dismiss the appeal of right was grounded on alleged want of prosecution (item 6, ftn. 3 cont'd below).

Respondent committee therefore took no steps to correct the record in that instance at that time.[4]

Trustee's attorney also obtained permission to file a brief in the extraordinary length of 91 pages (Pet. App. A. 60) and for oral argument (see Pet. App. A. 59) rather than the summary determination (under § 250 of the Bankruptcy Act) and memorandum brief originally ordered by the Court (Letter from Clerk dated December 12, 1969, accompanying grant of petition for leave to appeal).

In a per curiam decision dated October 27, 1970, the same panel of the court of appeals that had dealt with all the above recited motions reconsidered both its earl-

[footnote continued]

5. Motion to dismiss the appeal, alleging failure to comply with Court Order of Feb. 19, 1970, March 9, 1970 (see Pet. App. A. 58), and

6. Motion to dismiss appeal (#29560) under Local Rule 9(b), Feb. 25, 1970 (see Pet. App. A. 56).

[4]Since the issue is now raised by the petition, the committee moved to correct the record, attaching certificate executed by the deputy clerk whose signature is on the return receipt. Notwithstanding testimony of the deputy clerk, the Post Office employee in charge of records and of counsel's secretary, the district court decided against the committee, notification received as this brief goes to press. Counsel believe the order erroneous (a parallel contention by trustee of late filing in the court of appeals having been decided by that court in favor of the committee (Pet. App. A. 51), *supra*, p. 6) and are considering further corrective action. As shown below, this factual issue has not even marginal importance since the decision of the court of appeals is in any event correct on other grounds.

ier denial of the trustee's motion to consolidate the two appeals (one of right and one permissive) and its earlier denial of the committee's petition for permission to appeal the portions of the district court order relating to protection and instruction (Opinion below, A. 65).

On the merits, the court of appeals ruled:

1. As to fees: "The District Court was in error and much too low in its award of an interim fee to counsel for the Stockholders Protective Committee of $10,000 and expenses of $5,000 and the award is grossly inadequate." The court of appeals, reciting that it acted in the exercise of "our own independent judgment," adopted as "fair and reasonable" the SEC recommendation of $60,000 counsel fees and $10,000 reimbursment of expenses as partial allowances (Opinion below A. 66).

2. As to protection and instruction: "A protective order should have been issued by the District Judge to prevent undue harassment . . . The District Court was in error in denying the committee's motion for instruction defining the role of the committee." Further, the court ruled with respect to the *in terrorem* conditions of the fee award that "the interim award shall not be subject to vacation, setting aside, reduction or modification except upon proof of legal disqualification" (Opinion below A. 67, 68).

3. On a number of wild charges made by trustee and partially alluded to and relied on in the petition for certiorari[5] the court of appeals ruled as follows: "The several contentions and motions of the parties have been duly considered. They are disposed of either directly or by implication by what we have decided here" (Opinion below, A. 69).

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[5]One of these is the allegation (Petition p. 32) of "new and additional facts revealed subsequent to the hearing", a charge elaborately briefed below by trustee's attorney, e.g., Br. pp. 29-31, 72-78, and rejected by the Court of Appeals in the terms quoted in the text.

ARGUMENT

I. *No meritorious issue is presented as to the jurisdiction of the Court of Appeals* (Petition Question I, Committee Question III).

We have already pointed out in our restatement of the questions presented, *supra*, p. 2, that the issue of timeliness of the notice of appeal affects at most the issue raised concerning protection and instructions as to the future role of the committee. The fee award, appealed by allowance of a petition for leave to appeal timely filed, is not affected by this issue, but even as to protection/instruction, the court of appeals had proper jurisdiction:

A: Under Rule 4(a), Federal Rules of Appellate Procedure, the ordinary 30-day time for filing a notice of appeal is extended to sixty days if the government or a government agency is a party. Here the agency, the SEC, is not merely a nominal party, *United States v. American Society of Composers, A. & P.*, 331 F.2d 117, 119 (C.A. 2, 1964) cert. den. sub nom. *Shenandoah Valley Broadcasting, Inc., et al. v. American Society of Composers, A. & P.*, 377 U.S. 997, but actively participated as to the particular proceeding and the particular relief sought (protection against harassment).[6] On such facts the view of authoritative writers is that the sixty-day period applies in bankruptcy and reorganization cases, 9 *Moore, Federal Practice* (2d Ed. 1970) ¶ 204.10, esp. at p. 924-6; 2 *Collier on Bankruptcy* (14th ed. 1970) ¶ 25.02, p. 906. The committee, appellant below, filed notice of appeal and petition for leave to appeal early, in the interest of expedition, but clearly believed, reasonably and we submit correctly, that it had the protection of that period as expressly stated in its petition (Pet. App. A. 12).

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[6]SEC Memorandum on depositions, Ct. Ap. App. 563-471); Memorandum of the SEC, July 1970, Reply Memorandum of the SEC, September 1970, in Appeal # 29560, Court of Appeals; see Pet. App. A. 62.

B. We by no means concede that the notice of appeal was untimely, even if the 30-day period applied.[7] Had it not been timely there would still be no issue worth this Court's attention for the decision of the court of appeals is correct on other grounds.

C. Timely filing is no longer thought to be jurisdictional. 9 *Moore, Federal Practice*, ¶ 204.02[2] pp. 908-11. Even those cases that have called it jurisdictional do not call for formalistic rigorism. 9 *Moore, Federal Practice*, ¶ 203.09 pp. 728-30. If "some paper must be filed in at least one court or the other, to constitute a notice of appeal" *Federal Deposit Insurance Co. v. Congregation Poiley Tzedeck*, 159 F.2d163, 166 (C.A. 2, 1946), that was clearly done here. Even if the notice of appeal had not been timely, the much more informative petition for leave to appeal was specifically held timely by the court of appeals and suffices. 9 *Moore, Federal Practice*, ¶ 206.06 p. 1213. In fact, here the same issues were duly raised in the petition for leave to appeal and were properly reached in any event when the court of appeals, having previously rejected the permissive appeal on the protection/instruction issue and having denied trustee-appellee's motion for consolidation, reconsidered and granted the consolidation and stated that it "reconsidered" the denial of the permissive appeal as to protection/instruction.

D. Indeed, with the fee appeal properly before it, the court of appeals needed no notice of appeal at all to reach the closely related protection issue, to give, sua sponte, guidance to the district court. Petitioner makes no attempt to support his startling assertion (Petition p. 21) that the court of appeals, having once denied a permissive appeal, is "estopped" from reconsideration. He implies that the court of appeals is equally "estopped" from giving guidance th the district court. Clearly the court of appeals found it appropriate to give such guidance and it did so: it held the

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[7] See p. 7, ftn. 4, above.

depositions unnecessary in view of the award. The court also found the need for instruction clear: "The trustee through its counsel has taken the position throughout this appeal that the committee and its counsel are entitled to no compensation for their services"—and it proceeded to instruct trustee's attorney on the law and on the right of the committee "to participate fully" in the proceedings (Opinion below, A. 68). Even without having before it other aspects of the same order, the court of appeals for the Fourth Circuit found it appropriate to give guidance. Cf. *Carolina Mills v. Corry*, 206 F.2d 76, 77 (C.A. 4, 1953). A fortiori, the court of appeals here, dealing with the fee question and its implications for the ability of the committee to remain in the case, certainly had jurisdiction to give guidance on related issues.

* * * * *

Trustee's attorney became aware at least by February 1970 of the record filing date of November 13, of the notice of appeal.[8] He had then already raised and lost his parallel contention of untimeliness of filing of our permissive appeal; after that he raised several related invalid contentions of alleged lack of timeliness in our procedure (e.g., the partial list on p. ftn 3 above) but never raised the present jurisdictional contention in any of his many motions, briefs, petition for rehearing or petition for leave to file petition for rehearing.

This specious jurisdiction argument was thus hoarded to be shot off in this arena after all other ammunition had been spent in the court of appeals. It is transparently

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[8]Appellee's Response to Appellants' opposition to Motion to Dismiss Appeal, dated February 6, 1970, states on p. 2, par. 2: "that in conjunction with the Notice of Appeal . . . appellants did file a cost bond . . . on November 13, 1969"; Trustee's Motion to Dismiss Appeal under Local Rule 9(b) for want of prosecution, dated February 25, 1970, cited filing date of notice of appeal as November 13, 1969.

another phase of what we had complained of all along: a program to drive the committee and its counsel out of the reorganization by delay and attrition.

II. *No meritorious issue is presented as to the fee award by the court of appeals.* (Committee Question II)

The fee award clearly rests on its own peculiar facts. The district court fee award of $10,000 on account of 8000 hours of conscientious and competent service over eleven years "highlighted by the effective presentation in the Supreme Court of the United States" (Opinion below A. 67) is grossly inadequate as the court of appeals found. The court also found that "the circumstances here warrant the use of our own independent judgment in this [fee] controversy" (Opinion below A. 66); reviewing the services and the hearing thereon, it concluded that "in order to do substantial justice and to prevent undue hardship" it should adopt the SEC's recommendation as to amount which it considered "fair and reasonable" (Opinion below A. 67).

The modest interim fee of $60,000 awarded by the court of appeals raises no issue appropriate for review here. The courts of appeals, reviewing fees, frequently use their independent judgment. Petitioner inaccurately states that the Second and Third Circuits do not exercise like power (Petition p. 29, Petition Question V). When appropriate, they do, of course.[9] It was all the more appropriate for

[9]Matter of Hudson & Manhattan Railroad Co., 339 F.2d 144 (C.A. 2, 1964); In re General Economics Corp., 360 F.2d 762, 765(C.A. 2, 1966; Scribner & Miller v. Conway, 238 F.2d 905, 907 (C.A. 2, 1956); In the Matter of Nazareth Fair Grounds and Farmers Market, Inc., 374 F.2d 595 (C.A. 2, 1967); In re Solar Manufacturing Corp., 215 F.2d 555 (C.A. 3, 1954); In re Mountain States Power Co., 118 F.2d 405 (C.A. 3, 1941); see also Massachusetts Mutual Life Ins. Co. v. Brock, 405 F.2d 429, 435 (C.A. 5, 1968); In re Arlington Discount Co., 408 F.2d 490, 491 (C.A. 6,1969); In re Detroit International Bridge Co., 111 F.2d 235 (C.A. 6, 1940); Official Creditors Committee of Fox Markets Inc. v. Ely, 337 F.2d 461, 470-471 (C.A. 9, 1964).

the court of appeals to do so here because the district judge was new to the case and a large part of the services involved had been rendered in the court of appeals and their value was apparent from the records of that court.

The unsupported suggestion that committee counsel's services duplicated those of the Trustee, the SEC and the United States (Petition p. 30; Petition Question III) is contrary to uncontradicted testimony (Ct. Ap. App. 793-799, 815-16) and in any event immaterial as a matter of law, since it is well settled that a committee for a distinct class is not barred from compensation because other parties with other interests take some of the same positions (6A *Collier on Bankruptcy* §13.10 p. 968).

That the court of appeals abdicated its role in favor of the SEC (Petition p. 27; Petition Questions IV and V) is contrary to that court's express determination that it was exercising its "own independent judgment." It was clearly entitled however to give great weight to the views of the SEC, the only impartial participant throughout the proceedings (*Finn v. Childs Co.*, 181 F.2d 431 (C.A. 2, 1950); *In re General Economics Corp.*, 360 F.2d 762 (C.A. 2, 1966)).

Contrary to the innuendo of Petitioner's description of "usual procedure" (Petition p. 27, fn. 34), SEC counsel attended and cross-examined at the fee hearing (Ct. Ap. App. 630-635), and key SEC supervisory personnel who had participated throughout these proceedings are still participating.

The suggestion that the detail furnished by committee counsel in support of their interim fee application was inadequate (Petition p. 29; Petition Question V), is contradicted by the express ruling of the district court itself which held that a case had been made out and that fees could and would be awarded "without further hearing" (Ct. Ap. App. 840) and by the detailing stated in the court of appeals opinion (A. 67) as well as by the recommendation of the SEC (Ct. Ap. App. 263).

Petition Question VII is unintelligible. If it refers to the contention that a stockholders committee is without power to defend against confirmation of unfair plans of reorganization, with the consequence that it acts as a volunteer and is thereby precluded from compensation (Petition p. 33), this is not the Congressional intent of Chapter X in providing for representation of stockholders by a committee (§ 209) and for compensation to committees and their counsel (§ 242).

III. *No meritorious issue is presented by the protective provisions of the decision of the court of appeals.* (Committee Question I)

The premise of the court's opinion is the fact of harassment. The committee charged with SEC concurrence that trustee's attorney had engaged in deliberate harassment of the committee and its counsel (Pet. App. A. 10). The committee charged that the opposition to committee counsel's fees, the delays engendered by the multiplication of false charges, the threats, abuses and scheduling of depositions on matters already fully tried and easily ascertainable from the record itself[10] and by other methods less inconvenient to the committee were all part of a deliberate plan to drive the committee out of the case (Pet. App. A. 9-11); that this harassment was brought to the attention of the district judge and corrective action refused (Pet. App. A. 11); and that the award was not only inadequate but subject to *in terrorem* conditions (Pet. App. A. 8-9).

The court of appeals opinion makes clear that it found harassment to exist: referring to the SEC recommendations that the conditions to the fee award we had described as *in terrorem* should be stricken, the court held

> "Accordingly, in order to do substantial justice and to prevent undue hardship, we believe we should

[10] "The depositions would substantially duplicate what had already transpired in the contradictory proceeding before the District Judge himself." (Opinion below, A. 68)

> follow the SEC recommendation both as to amount and as to not being subject to vacation, etc., which we consider fair and reasonable and it is so ordered." (Opinion below A. 67)

As to depositions, the Court of Appeals held they were "unnecessary especially in view of the award we have made herewith" (Opinion below, A. 68) and declared:

> "A protective order should have been issued by the District Judge to prevent undue harassment."

In addition:

> "The District Court was in error in denying the Committee's motion for instructions defining the role of the Committee."

Very significantly, the Court of Appeals stated:

> "In the future the District Court should in the firmest and most emphatic manner possible, state to the Trustee and its counsel the absolute need of cooperation and harmony with the Protective Committee and its counsel to insure a proper determination and final wind-up of this reorganization." (Opinion below A. 68).

The suggestion (Petition pp. 21, 23; Petition Question VI) that these issues were not ripe for appeal, fully briefed below and raised again in the petition for rehearing en banc, amounts to saying that only after the committee is dead and long buried may it request protection. This is a reorganization badly off course. At an earlier stage we sought and obtained certiorari, and this Court reversed because the court of appeals had *failed* to give proper guidance to the district court, *Protective Committee v. Anderson,* 390 U.S. 414. Now, the court of appeals recognizing the need for guidance, has discharged that responsibility. There is no occasion for the intervention of this Court.

We close this brief in opposition with observation on some matters that do not warrant elaboration.

The Petition has only asserted but not demonstrated decisional conflict: it supplies some long strings of citations but leaves it to the Court to find the conflict. Similarly the Petition makes some bald statements and speculations of facts either without Appendix or other citation or else with citation that merely mystifies as to what facts, if any, the author of the petition may have had in mind, and it makes bold statements of law utterly without citation. Were this Petition the product of a jail-house lawyer in a *forma pauperis* case asserting the violation of constitutional rights the Court might well be tempted to overlook such matters, at least to the point of trying to determine whether there exist grievances, however imperfectly adumbrated.

The Court cannot fail to perceive that this petition, even though authorized by order of the district court, is a continuation of the treatment which the court of appeals expressly reproved.

This petition presents no meritorious issue but has further delayed funds essential to committee counsel's effective protection of stockholder rights. This case is now nearly fourteen years old; it has been carried without compensation for committee or counsel during all that time. Still undetermined are major issues crucial to the stockholders' protection and mandated by this Court. If committee and counsel are squeezed out, there will be no effective stockholder representation.

CONCLUSION

The decision below is correct and raises no issues worthy of the attention of this Court. The Petition for writ of certiorari should be denied.

Respectfully submitted,

Irma S. Mason

4740 Connecticut Avenue, N.W.
Washington, D.C. 20008

Irwin L. Langbein

301 Citizens Building
West Palm Beach, Florida

Counsel for Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc., and individual respondents Malcolm S. Mason, Irma S. Mason, Irwin L. Langbein

March 25, 1971

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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1385

IN THE MATTER OF TMT TRAILER FERRY, INC., ET AL., THOMAS J. KIRKLAND, TRUSTEE, PETITIONER

v.

PROTECTIVE COMMITTEE FOR INDEPENDENT STOCKHOLDERS OF TMT TRAILER FERRY, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF THE SECURITIES AND EXCHANGE COMMISSION IN OPPOSITION*

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A63–A69) is reported at 434 F. 2d 804. The opinion of the district court (Pet. App. A13–A17) is unreported.

* The Securities and Exchange Commission has been participating actively and continuously in the reorganization proceeding in the district court as a party pursuant to Section 208 of Chapter X of the Bankruptcy Act, 11 U.S.C. 608, since shortly after the commencement of the proceeding in 1957, and has taken positions in that court and in the court of appeals similar to the positions urged herein. As in *Protective Committee* v. *Anderson*, 390 U.S. 414, 420 n. 3, the Commission is "an unnamed respondent before this Court."

JURISDICTION

The judgment of the court of appeals was entered on October 27, 1970 (Pet. App. A72), and a petition for rehearing was denied on December 21, 1970 (Pet. App. A71). The petition for a writ of certiorari was filed on February 24, 1971. The jurisdiction of this Court is invoked under 11 U.S.C. 47(c) and 28 U.S.C. 1254.

QUESTIONS PRESENTED

1. Whether the court of appeals erred by increasing the district court's award of a partial interim allowance to attorneys for a Stockholders' Protective Committee from $10,000 to $60,000.

2. Whether the court of appeals properly held that the district judge should have issued a protective order against the taking of depositions of Committee members and counsel regarding the request for the interim allowance "to prevent undue harassment" (Pet. App. A68), and should have given instructions concerning subsequent participation by the Committee and counsel in the proceeding.

STATEMENT

Petitioner is the successor trustee of the estate of TMT Trailer Ferry, Inc., a debtor which has been in reorganization under Chapter X of the Bankruptcy Act, 11 U.S.C. 501, *et seq.*, since 1957. Various aspects of this proceeding have been before the court of appeals [1] and

[1] *Caplan* v. *Anderson*, 256 F. 2d 416 (C.A. 5); *Caplan* v. *Anderson*, 259 F. 2d 283 (C.A. 5); *TMT Trailer Ferry, Inc.* v. *Anderson*, 292 F. 2d 455 (C.A. 5), *certiorari denied sub nom. Shaffer* v. *Anderson*, 368 U.S. 956; *United States* v. *Anderson*, 334 F. 2d 111 (C.A. 5); *certiorari denied*, 379 U.S. 879; *In re TMT Trailer*

this Court. In *Protective Committee* v. *Anderson,* 390 U.S. 414, this Court reversed the confirmation of a plan of reorganization which would have excluded the debtor's stockholders from any further participation or interest in the reorganized company. It held that the company had been valued on an incorrect basis and that certain compromises of major claims had been improper because no hearings had ever been held on the claims or on objections to them which had been made by the Committee, the Commission and others. Accordingly, the Court remanded the proceeding to the court of appeals with directions to remand to the district court to determine the proper valuation of the debtor (*id.* at 453) and whether and on what terms the major claims might be compromised (*id.* at 441).

Upon remand the attorneys for the Stockholders Protective Committee applied in the district court for an interim allowance of counsel fees ($100,000 for services rendered from 1957 through June 30, 1968) and reimbursement of expenses ($22,100.91 for the period from 1957 through December 23, 1968) (Ct. Ap. App. 121, 127, 129, 159, 245).[2] Committee counsel had not theretofore received any compensation or reimbursement of expenses. The application stated that the three committee counsel had devoted more than 8,000 hours to the reorganization proceeding and that extensive

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Ferry, Inc., 334 F. 2d 118 (C.A. 5); *Protective Committee* v. *Anderson*, 364 F. 2d 936, (C.A. 5), reversed, 390 U.S. 414; *Travelers Indemnity Company* v. *Anderson*, 394 F. 2d 929 (C.A. 5); *Protective Committee* v. *Kirkland*, 434 F. 2d 804 (C.A. 5).

[2] "Ct. Ap. App." refers to the appendix filed in the court of appeals.

future services were contemplated (Ct. Ap. App. 159, 192). The application was supported by the Commission and opposed by the then trustee and most major creditors (Ct. Ap. App. 192, 212, 146, 199, 152, 157, 197, 206, 211).

Following a hearing on the application, at which the attorneys for several creditors, the Commission and the then attorney for the then trustee cross-examined two of the applicants (Ct. Ap. App. 793, 617), the district court found "exceptional circumstances" to justify the granting of the interim allowance and requested the Commission "to file a memorandum giving its views on what amount should be awarded to counsel" (Ct. Ap. App. 637–638). The Commission recommended an award of $60,000 in fees and $10,000 as reimbursement of expenses (Ct. Ap. App. 263).

Shortly after the hearing the trustee and his attorney resigned and a new trustee and counsel were appointed (Ct. Ap. App. 249, 260). Several months later the successor trustee filed a report alleging, *inter alia,* that the Committee and its counsel had been involved in a conflict of interest in their attempt to gain creditor treatment for allegedly defrauded stockholders; that the Committee had exceeded its authority in opposing as unfair and in appealing from the confirmation of plans which excluded stockholders from participating in the reorganized company; and that one of the Committee counsel was not properly designated as an attorney in the proceeding (Ct. Ap. App. 271).

The district court then entered an *ex parte* order postponing any award of compensation to committee counsel and authorizing further investigation of matters raised

in the report (Ct. Ap. App. 761). The trustee thereafter noticed the taking of depositions in Miami, Florida, of the members of the Committee and Committee counsel, most of whom lived at substantial distances (Ct. Ap. App. 367).[3] The trustee also announced that counsel for the Committee should not expect to be compensated from the estate as to future participation in the proceeding (Ct. Ap. App. 387–388). The Committee, supported by the Commission, moved for a protective order against the taking of the depositions and for instructions as to its future participation (Ct. Ap. App. 397, 431).

In October 1969, fourteen months after Committee counsel had applied for the interim allowance, the district court entered an order awarding $10,000 for services rendered and $5,000 reimbursement of expenses incurred during the first eleven years of the proceeding (Pet. App. A13). The same order denied the Committee's requests for a protective order and instructions and reserved jurisdiction to "amend, modify, alter or strike" the award at any future time (Pet. App. A15).

The Committee and its counsel obtained leave, pursuant to Section 250 of Chapter X, 11 U.S.C. 650, to appeal from those portions of the order regarding the award of compensation and reimbursement (Pet. App. A51).[4] They appealed as of right from those provisions

[3] Committee members reside in California and New York. Committee counsel live in West Palm Beach, Florida, and Washington, D.C.

[4] The court of appeals denied leave to appeal the other parts of the order under section 250 (Pet. App. A–53).

denying the protective order and instructions (Pet. App. A50).[5]

The court of appeals consolidated the two appeals. It reversed the district court, holding: (1) that Committee counsel were to be awarded $60,000 interim compensation for services rendered and $10,000 reimbursement of expenses and (2) that the district court should have granted the Committee's requests for a protective order and instructions as to its future participation in the proceeding.

ARGUMENT

The decision of the court of appeals was correct and presents no issue warranting review by this Court.

1. The Committee, which represents the interests of thousands of small, widely scattered stockholders, has performed its role in this lengthy proceeding effectively, as this Court is aware. See *Protective Committee* v. *Anderson,* 390 U.S. 414. Committee counsel have labored nearly 14 years without receiving any compensation or reimbursement of expenses. They have benefited the estate, as both courts below recognized (Pet. App. A16, A67). They should, therefore, be given adequate interim compensation "to prevent undue hardship" (Pet. App. A67) and to insure that they will be able to continue to render beneficial services in the proceeding.

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[5] The petition advances, for the first time, the contention that the appeal was untimely (Pet. 4, 24). We understand that the Committee, in its brief in opposition, will discuss this question. In any event, it is not questioned that the petition for leave to appeal was timely filed, so any defect would not appear to have been jurisdictional. 9 Moore, *Federal Practice* 1213 (2d ed., 1970). Cf., *Reconstruction Finance Corporation* v. *Prudence Securities Advisory Group,* 311 U.S. 579.

There is no conflict among the circuits, as petitioner contends (Pet. 24), as to whether a court of appeals, when it disagrees with an award of fees made by the district court, can increase or decrease the award itself. Although the courts of appeals frequently do remand cases to the district court for determination of reasonable fees, the fixing of fees by the courts of appeals themselves is not uncommon,[6] particularly where substantial amounts of the services have been performed before them.[7] In the circumstances of this case, the court of appeals properly concluded that the use of its "own independent judgment" was warranted (Pet. App. A66).

The court of appeals has had extensive experience with this proceeding, numerous aspects of which have

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[6] See, *e.g.*, *In re Arlington Discount Co.*, 408 F. 2d 490, 491 (C.A. 6); *In the Matter of Nazareth Fair Grounds and Farmers Market Inc.*, 374 F. 2d 595, 598 (C.A. 2); *Official Creditors' Committee of Fox Markets, Inc.* v. *Ely*, 337 F. 2d 461, 470–471 (C.A. 9); *Scribner & Miller* v. *Conway*, 238 F. 2d 905, 907 (C.A. 2); *In re Solar Manufacturing Corp.*, 215 F. 2d 555 (C.A. 3); *In re Detroit International Bridge Co.*, 111 F. 2d 235 (C.A. 6). Occasionally, instead of fixing a specific fee at the appellate level, a court of appeals remands to the district court for further proceedings but requires that the fee not exceed a maximum specified limitation. See, *e.g.*, *In re Imperial '400' National, Inc.*, 432 F. 2d 232, 240 (C.A. 3); *Massachusetts Mutual Life Insurance Co.* v. *Brock*, 405 F. 2d 429, 435 (C.A. 5), *certiorari denied*, 395 U.S. 906; cf., *Finn* v. *Childs*, 181 F. 2d 431 (C.A. 2).

[7] *E.g.*, *In re Solar Manufacturing Corp.*, *supra*, 215 F. 2d at 561; *In the Matter of Nazareth Fair Grounds and Farmers Market, Inc.*, *supra*, 374 F. 2d at 597.

been before it on appeal (see n. 1, *supra*).[8] The court accepted the "fair and reasonable" (Pet. App. A66, 67) recommendation of this Commission, which, it noted, had participated fully in the proceeding from its inception and was "intimately familiar with the services rendered by the Committee's counsel over a long period of years" (*ibid.*).[9]

2. The court of appeals correctly ruled that the district court should have issued a protective order against the taking of depositions on the issue of the interim award "to prevent undue harassment" (Pet. App. A68). As the court noted, "[a] full hearing had already been held on the issue" (*ibid.*). There is nothing in the opinion, moreover, which suggests that the district court cannot reexamine the award if evidence of mis-

[8] By contrast, the present district judge was assigned to this case only after the remand by this Court in 1968, subsequent to the period for which the allowance was requested. Similarly, the trustee and his counsel, both of whom were appointed by the present district judge, had no connection with the proceeding during that period.

[9] When the Commission enters a corporate reorganization proceeding under Chapter X, it becomes a party with the rights of any other party, except that it may not appeal and its attorneys may not receive fees. 11 U.S.C. 608, 642. The Commission usually makes recommendations with regard to fees, which are, of course, advisory only. But since the Commission is the only party to the proceeding with no financial interest in the outcome, some courts have given substantial weight to the Commission's recommendations. See, *e.g.*, *In re Imperial '400' National, Inc.*, *supra*, 432 F. 2d at 240; *Finn* v. *Childs*, *supra*, 181 F. 2d at 438; *In re General Economics Corp.*, 360 F. 2d 762, 765 (C.A. 2).

conduct or conflict of interest by the Committee, warranting disqualification of any fee, is produced.[10]

The court also correctly held that the district court "was in error in denying the Committee's motion for instructions defining [its] role" in future proceedings. The new trustee's counsel had made repeated statements that efforts by the Committee in important aspects of the reorganization proceeding that had been ordered by this Court, 390 U.S. 414, 453, would not be compensable (Ct. Ap. App. 369, 387–388). It was thus necessary to make it clear that the Committee was "entitled to participate fully in these proceedings, and if its services result in some benefit to the estate, compensation for those services is authorized" (Pet. App. A68).

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[10] The Commission did not, as petitioner contends (Pet. 25, n. 31), take the position before the court of appeals that the only possible legal disqualification is that set forth in Section 249 of the Bankruptcy Act, 11 U.S.C. 649. Commission counsel pointed out in argument that any legal disqualification may be a ground for forfeiture. And the Commission's brief in the court of appeals (No. 29089) stated (p. 25): "Any allowance now awarded should be immune from later reduction or vacation unless evidence should demonstrate at a later time legal reasons for forfeiture of the allowance, such as, for example, conflict of interest (*e.g.*, *Woods* v. *City Bank Co.*, 312 U.S. 262 (1941)) or trading in securities of the debtor in violation of Section 249 of Chapter X (*e.g.*, *Wolff* v. *Weinstein*, 372 U.S. 633 (1963))."

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

PHILIP A. LOOMIS, JR.,
General Counsel,

DAVID FERBER,
Solicitor,

PAUL GONSON,
Assistant General Counsel,

ROBERT E. GINSBERG,
Attorney,
Securities and Exchange Commission.

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